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No. 522

In the

Supreme Court of the United States

OCTOBER TERM, 1961

AMERICAN EMPLOYERS INSURANCE COMPANY,
Petitioner,

v.

JOHN ZABLOSKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	4
1. The Jurisdiction of the United States District Court	4
2. The Issues in the Courts and How Joined	4
3. Facts Adduced Upon the Trial	7
Reasons for Granting the Writ	18
Certificate of Service Upon Adverse Party	25
Appendix A—Opinion of United States Court of Appeals	29-34
Appendix B—Judgment of United States Court of Appeals	35
Appendix C—Order of United States Court of Appeals Overruling Motion for Rehearing	37
Appendix D—Article 1436-1, Texas Penal Code	39-67
Appendix E—Opinion in Empire Gas and Fuel Company v. Muegge, 135 Tex. 520, 143 S. W. 2d 763 (Commission of Appeals, Opinion Adopted by S. Ct. Tex. 1940)	69-85
Appendix F—Opinion in Pioneer Mutual Compensation Company v. Diaz, 142 Tex. 184, 177 S. W. 2d 202 (S. Ct. Tex. 1944)	87-93
Appendix G—Opinion in United States Casualty Company v. Ohio Casualty Insurance Company, 208 Fed. 2d 451 (Fifth Circuit)	95-97

Page

Cases

American Fidelity and Casualty Company, Inc. v. St. Paul Mercury Indemnity Co., 248 Fed. 2d 409 (Fifth Circuit) 24

Empire Gas and Fuel Company v. Muegge, 135 Tex. 520, 143 S. W. 2d 763 (Commission of Appeals Opinion Adopted S. Ct. Tex. 1940) 3-4, 19

Pioneer Mutual Compensation Company v. Diaz, 142 Tex. 184, 177 S. W. 2d 202 (S. Ct. Tex. 1944) 4, 20

Transport Insurance Company v. Standard Oil Company of Texas, 337 S. W. 2d 284 (S. Ct. Tex. 1960) 24

United States Casualty Company v. Ohio Casualty Insurance Company, 208 Fed. 2d 451 (Fifth Circuit) 4, 19, 22

Statutes

28 U. S. C. Sec. 1254 2

Texas Penal Code, Article 1436-1 3

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American Employers Insurance Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in its cause number 18,550 on the 30th day of June, 1961 and finalized on the 14th day of September, 1961, by the overruling of a petition for rehearing filed by the petitioner.

OPINIONS BELOW

No opinion was rendered by the United States District Court for the Northern District of Texas. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in the Federal Reporter, Second Series, at 292 Federal Second 412 and is appended hereto as Appendix A (pp. 29 to 34).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on the 30th day of June, 1961 (Appendix B, p. 35. A Petition for Rehearing was denied on the 14th day of September, 1961 (Appendix C, p. 37). The jurisdiction of this Court is invoked under *28 U. S. C., sec. 1254.*

QUESTIONS PRESENTED

The judgments of the District Court and the Court of Appeals held that petitioner was required to pay a judgment obtained by respondent in a State Court against certain persons alleged to be insureds under a policy of automobile liability insurance. The following questions are presented to this Court:

1.

Whether the Court of Appeals erroneously applied the provisions of the Motor Vehicle Certificate of Title Act of the State of Texas on the question of true ownership of the Motor Vehicle involved in conflict with the applicable inter-

pretations of that law as espoused by the Supreme Court of Texas, thereby denying to the petitioner its right of property.

2.

Whether the Court of Appeals erroneously failed to give effect to the plain language of the insurance policy in question in conflict with the decisions of the highest court of the State of Texas, the Supreme Court of Texas.

STATUTE INVOLVED

Artitcle 1436-1, Texas Penal Code, identified as Motor Vehicle Certificate of Title Act, is the Statute involved in this litigation to be given effect. It is found at volume 3, Vernon's Texas Penal Code, pages 364 to 379. Because the statute is volumious it is set out verbatim in Appendix D (pp. 39 to 67). This statute provides generally for the registration of every kind of motor driven or propelled vehicle so as to lessen and prevent the theft of motor vehicles and house trailers and the importation into the State of Texas of and, traffic in, stolen motor vehicles and house trailers and the sale of encumbered motor vehicles and house trailers without enforced disclosure to the purchaser of any and all liens for which any such motor vehicle and house trailer stands as security. The effect, if any, of this statute upon the question of who was the true owner of the vehicle in question is here involved.

The only applicable decisions of the Supreme Court of Texas on the questions here presented are *Empire Gas and*

Fuel Company v. Muegge, 135 Tex. 520, 143 S. W. 2d 763 (Commission of Appeals, opinion adopted by S. Ct. Tex. 1940), appended as Appendix E (pp. 69 to 85), and *Pioneer Mutual Compensation Company v. Diaz, 142 Tex. 184, 177 S. W. 2d 202 (S. Ct. Tex. 1944)*, appended as Appendix F (pp. 87 to 93), as previously recognized by the United States Court of Appeals, Fifth Circuit, in *United States Casualty Company v. Ohio Casualty Insurance Company, 208 Fed. 2d 451 (Fifth Circuit)*, appended as Appendix G (pp. 95 to 97). These decisions show the effect given to the statute under the substantive law of the State of Texas on the questions here presented.

STATEMENT OF THE CASE

1. The Jurisdiction of the United States District Court.

This is a suit originally brought by the respondent, John Zablosky, against petitioner, American Employers Insurance Company, in the District Court of Dallas County, Texas. The case was removed to the United States District Court for the Northern District of Texas, Dallas Division, by the petitioner American Employers Insurance Company on the basis of diversity of citizenship and the United States District Court maintained jurisdiction on that basis.

2. The Issues in the Courts Below and How Joined.

This suit was brought by the respondent to recover from the petitioner upon a policy of automobile liability insurance the amount of a judgment obtained in 1954 against Roy Alvin Tucker and H. L. Flynt in the District Court of Van Zandt County, Texas.

The respondent has maintained in the proceedings below that Roy Alvin Tucker and H. L. Flynt were insured under a fleet type policy of automobile liability insurance issued by American Employers Insurance Company to B. F. Schoeneman, d/b/a Midwest Contracting Company and various other enterprises. (The policy appears at pages 188 to 228 of the Transcript.) The basic claim made by the respondent is to the effect that B. F. Schoeneman, d/b/a Midwest Contracting Company, because of the effect of the Motor Vehicle Certificate of Title Act of Texas, was the true owner of the vehicle involved in the collision which was the subject of the Van Zandt county, Texas litigation, that H. L. Flynt was operating the vehicle through his employee, Roy Alvin Tucker, with the permission and consent of B. F. Schoeneman, d/b/a Midwest Contracting Company. The respondent asserted that because B. F. Schoeneman, d/b/a Midwest Contracting Company was the owner of the vehicle in question and because the vehicle was being operated with his permission and consent, the policy of insurance in question became effective to cover H. L. Flynt and Roy Alvin Tucker in the accident because of the so-called "Omnibus clause" of the policy. Respondent also asserted that the conditions precedent to bringing suit under the policy had been complied with prior to the filing of this litigation which was tried in the United States District Court. Other issues were urged by the respondent in the trial court but did not form the basis for the judgment in the case nor were the issues considered by the United States Court of Appeals.

The issue of ownership of the vehicle in question was raised by an offering into evidence by the respondent of a certified copy of the title history showing the registered owner under the Motor Vehicle Certificate of Title Act to be Midwest Contracting Company (Tr. 241, 242), a copy of the registration records (Tr. 243, 244), showing Midwest Contracting Company as the record owner during the year in question, a copy of the conditional sales contract from Bankston-Hall Motors, Inc. to Midwest Contracting Company (Tr. 284, 285), and a copy of the certificate of title to the motor vehicle in question showing the registered owner as Midwest Contracting Company (Tr. 286). Thus the effect of the Texas Motor Vehicle Certificate of Title Act is invoked.

The petitioner, through respondent's and its own witnesses offered positive undisputed proof to the effect that while the vehicle was registered in the name of Midwest Contracting Company, an enterprise of B. F. Schoeneman, the true owner was in fact H. L. Flynt, and that the purchase arrangement was made by H. L. Flynt with B. F. Schoeneman whereby the record title would be taken in the name of B. F. Schoeneman, d/b/a Midwest Contracting Company, as a mere financing arrangement to permit H. L. Flynt to purchase the vehicle for his sole use and benefit to be utilized in his business, a long-haul trucking business; that H. L. Flynt had the responsibility of maintenance and upkeep and care of the vehicle in general, that he had to answer to no one for its use or maintenance; that all income secured through the operation of the vehicle belonged to H. L. Flynt; that B. F. Schoeneman had no real interest in the vehicle and merely permitted his name to be used as a financial accommodation as to H. L. Flynt.

In the District Court and in the Court of Appeals the petitioner asserted that under the facts presented to the Courts the application of the Motor Vehicle Certificate of Title Act did not determine true ownership and under the recognized law as applied by the Supreme Court of Texas, the true owner was H. L. Flynt, and therefore the omnibus clause of the insurance policy did not operate to insure H. L. Flynt and Roy Alvin Tucker, and the claim of the respondent should fail.

The District Court made a determination that the facts on the question of true ownership of the vehicle were in dispute and submitted the issue of true ownership to the jury for determination. The United States Court of Appeals for the Fifth Circuit agreed that a jury issue existed and affirmed the judgment of the trial court founded upon the jury verdict.

3. Facts Adduced Upon the Trial.

The facts before the trial court and reviewed by the Court of Appeals are simple and undisputed:

In December of 1952, a man by the name of H. L. Flynt who operated a trucking business was desirous of purchasing for his use a tractor unit, the unit to be operated in the trucking business itself (Tr. 91-93). The desired vehicle in question was located at Bankston-Hall Motors in Dallas, Texas, by H. L. Flynt, and negotiations towards a purchase were opened (Tr. 91-92). H. L. Flynt could not make the required down payment on the equipment, and it was impossible for him to finance the truck on a 100 percent basis through Bankston-

Hall Motors thus making it impossible for H. L. Flynt to complete the transaction (Tr. 93).

At this point B. F. Schoeneman, d/b/a Midwest Contracting Company, was brought into the picture. B. F. Schoeneman was contacted by H. L. Flynt and requested to assist the financing of the vehicle because Mr. Flynt did not have a sufficient down payment to cover the transaction (Tr. 68-69).

B. F. Schoeneman indicated that he was agreeable to taking the title to the vehicle in question into his own name or the name of Midwest Contracting Company, his wholly owned enterprise, and that he would accept the responsibility for payment in his name in order to assist H. L. Flynt to purchase the vehicle (Tr. 94, 67-70). Mr. Schoeneman did indicate that he would require H. L. Flynt to pay to him each month one and one half times the normal monthly payment in order that the vehicle would not be carried on the books of the Midwest Contracting Company for too lengthy a period of time (Tr. 69). Also at this point it was indicated that Mr. Schoeneman would expect some priority in treatment where his company needed goods hauled by Mr. Flynt with this or any other vehicle (Tr. 94, 97, 75-77). Respondent's own witness B. F. Schoeneman recited the arrangement, as follows:

> "Q. Now with regard to this 1952 Ford Truck, did you send Mr. Flynt to look for a truck or to look for a truck to buy for either himself or for you?
>
> "A. No, sir.
>
> "Q. Then I take it you did not need the new truck at the time that this one was purchased?
>
> "A. No, sir.

"Q. Mr. Schoeneman, what was the first knowledge that you had of Flynt's need for a truck or desire to purchase one?

"A. When he telephoned me from Bankston Hall Motor Company saying—telling me that he was down there trying to buy a Ford truck, that he needed another truck.

"Q. All right, sir. What was the purpose of this call to you, Mr. Schoeneman?

"A. He told me that he was not able to finance the transaction himself because he did not have a tradein or the down payment on the truck.

"Q. All right, sir. Did he request of you assistance in financing the truck in some fashion?

"A. Yes, sir.

"Q. Was an agreement reached between you and Mr. Flynt as to the method of helping him buy this truck?

"A. Yes, sir.

"Q. And would you explain to us what the arrangement was that was made between you and Mr. Flynt?

"A. I just told him that he could put the truck in our name. Bankston Hall had told him that they would sell it to him on the terms that they had agreed, over the period of time they had agreed. that he could put it in our name and that I agreed to it over the telephone, he telling me that he would make the payments as required to us.

"Q. All right, sir. Did you have some kind of arrangement with him, oral arrangement, that he was supposed to try to pay you either through work or money more per month than he actually was to have paid in the way of monthly payments?

"A. Since I told him that we were not in the financing business and I didn't want to extend it over that period of time, as far as his obligation to us was concerned. I

asked him to make a payment and a half each month if he could to get ahead of it.

"Q. And the payments that were to be made, incidentally, to the financing company included his fire and collision policy that has been—

"A. Yes, sir. I didn't know anything about the fire and collision policy. We didn't place it on there. It was placed on there by the finance company that handled it for Bankston Hall.

"Q. All right, sir.

"A. It was included in the payments. All I knew was the total amount of payments.

"Q. Your agreement with Mr. Flynt was that he was to eventually pay you the total amount of the payments, is right?

"A. He was to pay us the total amount of the payments.

"Q. And you, in turn, paid the financing company that worked through Bankston Hall?

"A. Yes, sir.

"Q. Now, Mr. Schoeneman, at that time, did you—or at any other time—go down and look at and examine the truck or have anyone connected with Midwest do so?

"A. No, sir.

"Q. As far as you were concerned, the truck was sight unseen?

"A. That is right.

"Q. All right, sir. And the papers that you executed, do you remember where they were signed?

"A. They were brought out to our office by Flynt, and after looking them over, I signed them and carried them on back.

"Q. All right, sir. Was the truck delivered to you?

"A. No, sir. I never saw the truck for a long time after that.

"Q. The truck, then, was turned over to Mr. Flynt?

"A. Yes sir.

"Q. Was there any consideration or any understanding between you and Mr. Flynt as to any control over the vehicle?

"A. None whatsoever.

"Q. You did not attempt to exercise any control over the vehicle then?

"A. Never.

"Q. Who took care of the maintenance, insofar as you know?

"A. Well, he did. If it was maintained, he did it.

"Q. You did not take care of the maintenance?

"A. No, sir.

"Q. Or your company?

"A. No, sir.

"Q. You did not purchase the oil or gas for its use, then?

"A. No, sir.

"Q. And when Mr. Flynt did hauling for you or for Midwest and used this truck or any other, you paid him by the foot on hauling pipe, did you not?

"A. Yes, sir, mostly—to my knowledge, that is the only way it was paid.

"Q. And if he hauled heavy machinery or something, you paid him for it by the load is that right?

"A. Yes, sir.

"Q. Did you at any time hire any drivers to be used in this or any other truck for Flynt?

"A. No, sir, I didn't know the drivers." (Tr. 68-71.)

The agreement having been reached by all parties the papers were prepared, including title and registration in the name of B. F. Schoeneman, d/b/a Midwest Contracting Company, and a Conditional Sales Contract with a Promissory Note attached thereto was brought to B. F. Schoeneman and executed by him as a favor to H. L. Flynt as already pointed out (Tr. 58, 59, 70).

B. F. Schoeneman did not see the vehicle in question nor did he have anything to do with the actual selection of the vehicle or any transaction connected with its purchase except as outlined above (Tr. 70). H. L. Flynt took immediate possession of the truck (Tr. 96, 66, 70) and used it in his business as a contract hauler, agreeing as already mentioned to give B. F. Schoeneman preferential treatment in use of the vehicle (hauling loads for Midwest Contracting Company in preference to other contractors where a conflict in scheduling arose) (Tr. 94-97, 75-77, 79).

At this point it should be noted that actually the payments by H. L. Flynt to B. F. Schoeneman, to extinguish the indebedness, were made in the form of hauling work, no cash ever being passed in the transaction (Tr. 107-108). Credits were accumulated on the books of B. F. Schoeneman in the name of H. L. Flynt until such time as the transaction could be written off at which time bookkeeping entries were made and the matter disposed of (Tr. 77-78).

H. L. Flynt was paid or credited for work when he did hauling for B. F. Schoeneman by the foot per mile haul, or on a per load basis, depending upon whether the load hauled was pipe or heavy equipment (Tr. 95). H. L. Flynt had his own drivers paying said drivers himself to drive the vehicle in question and did not utilize any of B. F. Schoeneman's employees (Tr. 96-97). Mr. Schoeneman had no interest in the hiring or firing of drivers handling any of Flynt's trucks including the one in question herein. As a matter of practice H. L. Flynt furnished the vehicle in question with gasoline and oil and made all the necessary repairs and generally took care of the maintenance in connection with the vehicle in question (Tr. 96). Mr. Schoeneman furnished nothing in connection with the maintenance and upkeep of the vehicle (Tr. 70). Mr. Flynt utilized the vehicle in question in his business, collecting the monies charged for the use thereof (Tr. 95).

At the time of the accident which is made the basis of the suit the truck in question was being driven by one of H. L. Flynt's employees on a mission for Mr. Flynt to haul a load for a firm which had no connection with B. F. Schoeneman (Tr. 15, 114, 116-117, 129).

Each year the vehicle was registered in the name of Midwest Contracting Company by H. L. Flynt and after the initial registration Mr. Flynt gave his own Ennis, Texas, address as the address on the registration (Tr. 98). Each year Mr. Flynt paid for the yearly registration himself (Tr. 98).

B. F. Schoeneman carried the transaction on the books of his company, Midwest Contracting Company, to conclusion

(Tr. 153-170, 171-175), but he did not carry the equipment as owned equipment nor did he deperceiate it in his business each year as he did the equipment owned by his company, or himself (Tr. 156).

B. F. Schoeneman, doing business as various proprietorships including Midwest Contracting Company, purchased a so-called Fleet Policy of insurance to cover the various vehicles which he owned, operated or leased or had some connection with in varying capacities. (The policy appears at Tr. 188-288.) The vehicle in question was listed on the policy as "Owned by H. L. Flynt and leased to insured." (Tr. 207.) The policy of insurance also contained an endorsement, dated December 28, 1952, reading:

> "Title to the 1952 Ford Truck * * * is vested in the name of B. F. Schoeneman, d/b/a Midwest Contracting Company, however, said automobile has been sold under a conditional agreement to H. L. Flynt. It is agreed that for interpretation of coverage under the policy H. L. Flynt shall be considered to be the owner of said automobile." (Tr. 222.)

During the trial of the case the agent who wrote the policy of insurance for the appellant testified that he knew of the particular transaction in connection with the vehicle in question. He testified that B. F. Schoeneman desired to have protection for the Schoeneman interests only:

> "Q. All right, sir. In caring for his insurance needs and desires, have you or not discussed from time to time with him and his office personnel various problems that arise in his needs and desires as far as insurance is concerned?
>
> "A. Many of them.

"Q. With regard to this particular 1952 Ford truck, did you discuss that situation with some of them?

"A. I am sure I did.

"Q. And in that connection, do you know what kind of coverage or what kind of protection was desired or did you discuss it?

"A. Our only interest in discussion was how was it best to protect the Schoeneman interest.

"Q. And did you attempt to do that?

"A. That is the intent in this contract." (Tr. 135.)

It was testified by the witness that B. F. Schoeneman instructed the insurance agent to do whatever was necessary to give him protection (Tr. 135). B. F. Schoeneman also testified to the same transaction advising that he left it up to his insurance agent, in this instance Ellis-Smith & Company, to determine the specific coverage that was needed under the circumstances, but that it was his desire to obtain protection for himself in the event that there was a need for him to be protected because of the peculiar transaction surrounding the purchase of the vehicle by H. L. Flynt:

"Q. Mr. Schoeneman, did you also have the Ford truck put on your public liability policy?

"A. I don't know how it was carried on the liability policy.

"Q. My question was not how it was carried, but did you have it put on there?

"A. I instructed my secretary to call our agent and explain the transaction to him that had been made and asked him to protect us." (Tr. 64.)

"Q. Now, Mr. Schoeneman, you mentioned a while ago that you instructed your secretary or bookkeeper to

get in touch with your agent, your insurance agent, and explain the circumstances to him and let him know you wanted to protected, is that right?

"A. That is right.

"Q. Did you, at any time, attempt to make a purchase of any insurance policy for H. L. Flynt or Roy Alvin Tucker?

"A. No sir.

"Q. Have you at any time attempted to buy any sort of insurance protection for and on behalf of either of those men?

"A. No, sir." (Tr. 73.)

It is upon this basis that the vehicle was added to the policy in question, the premium being on a specified car basis, the same cost in dollars and cents as the premium for an owned automobile. (Tr. 137-138.)

Respondent's own witness, J. H. Albright, engaged in the insurance business, made it clear as to why this was so, saying the registration of the vehicle alone caused it:

"Q. Mr. Abright, in other words, regardless of the true ownership of the vehicle, if a vehicle were registered in the name of the insured, in this case the agent would just charge the specified car basis?

"A. That is right. He couldn't write it as a hired automobile if it is registered in the name of the assured.

"Q. And is the ownership registration what causes it?

"A. The ownership or registration.

"Q. And it does not have anything to do with whether or not the insured is the true owner: it is that he is the

registered owner that requires it to be the specified car basis?

"A. I would think that to be true." (Tr. 84.)

This witness further indicated that the policy before the court had not been questioned by the Insurance Department of Texas as to the correct premiums under the endorsements previously quoted with regard to true ownership (Tr. 88). And the matter of the department's specific approval was evidenced by a letter to the insurer offered into evidence (Tr. 148 ff), the instrument itself appearing in the transcript at pages 298-299.

The express intent of the insurance carrier and the insured who was paying the premium was to provide protection to the insured who was paying premium in the event he was in some way exposed to liability. The policy itself issued by the insurance company, petitioner, through the agent, Ellis-Smith & Company, to B. F. Schoeneman contained express language to the effect that all parties acknowledged the particular transaction and the true ownership of the vehicle is H. L. Flynt.

These policy endorsements were not something added by the petitioner after the policy had run its course merely to defeat the respondent in this case. These endorsements were added long prior to the accident and at the agreement of the parties to the contract of insurance to reflect correctly their understanding as to the real ownership status of the vehicle. The agreement to purchase and sell insurance and what was to be insured was of long standing in December of 1953 when the accident occurred. This the record makes abundantly clear.

Both H. L. Flynt and B. F. Schoeneman testified in unanimity to the actual ownership of the vehicle in H. L. Flynt and not B. F. Schoeneman and that there never was any intention at any time for B. F. Schoeneman either to own, control, or otherwise exert any ownership activity in connection with the use of the vehicle in question.

In the Van Zandt County litigation made the basis of this suit, B. F. Schoeneman was one of the original defendants and in accordance with its obligation to B. F. Schoeneman, the petitioner entered an appearance for him and defended him in the litigation until he was dismissed from the suit prior to judgment being taken by the respondent against H. L. Flynt and Roy Alvin Tucker for $100,000.00, plus costs and interest. (Tr. 73-74.)

REASONS FOR GRANTING THE WRIT

1.

Important rights of property are in question in this case which rights are and should be established under state law. Whether the Court of Appeals has destroyed those rights of property resting in the petitioner by ignoring the state law involved is a question of considerable importance and should be reviewed by this court.

Judgment was rendered against the petitioner by the United States District Court and affirmed by the Court of Appeals which judgment was written contrary to the law of the State of Texas as outlined by the Supreme Court of Texas. The question raised is one of considerable impor-

tance because by departing sharply from the decisions of the State Supreme Court, the Federal Courts determining this case have set up a body of substantive law applicable in the Federal Court but not recognized as valid in the State Court under which substantive law certain policies of liability insurance approved by the State Insurance Commission are to be construed particularly where the question of ownership of a motor vehicle and property rights affected thereby is involved. To permit the decision of the United States Court of Appeals in this case to stand will permit this second standard to remain effective in direct conflict with the recognized state law.

The United States Court of Appeals for the Fifth Circuit not only has departed from the convention of state law but has rendered a decision in conflict with its own decision in the earlier case of *United Casualty Company v. Ohio Casualty Insurance Company, 208 Fed. 2d 451 (Fifth Circuit).*

The obligation of the court to determine the true ownership of a motor vehicle regardless of the manner in which the vehicle is registered under the Motor Vehicle Certificate of Title Act is not at all a new question in Texas. There are two basic decisions, one rendered in 1940 and one rendered in 1944, both of which were ignored both by the District Court and the Court of Appeals in rendering a decision in this case. The case of *Empire Gas and Fuel Company v. Muegge, 143 S. W. 2d 763 (Com of Appeals, 1940, adopted S. Ct. Tex.)*, was the first decision announced by the Supreme Court of Texas construing the Certificate of Title Act as it affected the true ownership of a registered motor

vehicle. The Supreme Court held that the registration of a particular vehicle in the name of a particular individual or company under the Certificate of Title Act raised an administrative presumption to the effect that such person or company was the true owner of the registered vehicle. The Supreme Court of Texas also held that if this presumption was left standing alone, it would be sufficient to sustain a finding of ownership in the named individual in the certificate. The Supreme Court of Texas held, however, that this being a true administrative presumption, it was not evidence under Texas law but only a procedural thing and when met by rebutting proof it was not to be weighed by the jury or treated by the jury or the court as any evidence in arriving at a verdict or decision on the question of true ownership. The Supreme Court of Texas through its commissioner stated:

> "It follows that the presumption as to the ownership of the truck arising from the registration and presumption as to its use in transporting the ditching machine arising from the permit are not to be regarded as having raised an issue or issues of fact for the jury's determination if such presumptions are met by positive rebutting proof."

The Supreme Court of Texas held that the administrative presumption is conclusively overcome by clear, positive and undisputed evidence.

In 1944, the Supreme Court of Texas reiterated its position and affirmed the previous decision concerning the same question in *Pioneer Mutual Compensation Company v. Diaz, 177 S. W. 2d 202 (S. Ct. Tex., 1944)*. The court

again said that the registration of the motor vehicle raised the presumption of ownership but such presumption was not evidence but an administrative presumption which vanished when positive evidence to the contrary is introduced into the trial.

Under the decisions as outlined by the Supreme Court of Texas there was raised in this case an administrative presumption to the effect that B. F. Schoeneman was the true owner of the vehicle in question. There also was clear, positive, rebutting proof to the effect that H. L. Flynt and not B. F. Schoeneman was the true owner of the vehicle in question, and there was not offered in rebuttal any proof to the contrary to conflict with the evidence of an undisputed nature establishing true ownership in H. L. Flynt.

It is here that the District Court gave lip service to the decisions of the Texas Supreme Court but literally turned its back upon those decisions in refusing to determine an issue of law but instead submitted it to a jury for determination and permitted that jury in direct conflict with the decisions of the Texas Supreme Court to consider the registration of the vehicle in question in the name of B. F. Schoeneman d/b/a Midwest Contracting Company as a part of the evidence in the case, and rendered judgment on a verdict which as a matter of law ran contrary to the decision of the Texas Supreme Court.

The Court of Appeals also refusing to recognize its obligations to decide the case in accordance with the decisions of the Texas Supreme Court nevertheless recited the evidence in its opinion which was clear, positive, and undisputed and

rebutting the administrative presumption, and then turning its judicial head aside so as to blind itself to the state law affirmed the judgment. By so doing, the Court of Appeals turned its back upon the decisions of the Texas Supreme Court and in effect, created a standard of substantive law wholly foreign to the decisions of the Supreme Court of Texas which decisions should be controlling on issues submitted in the trial and in the appellate procedures before the Federal Courts in this case.

Not only did the Court of Appeals turn its back upon the decisions of the Texas Supreme Court, it also turned its back upon its own decision earlier rendered in *United States Casualty Company v. Ohio Casualty Insurance Company, 208 Fed. 2d 451 (Fifth Circuit).*

In order to arrive at a decision, the Court of Appeals not only had to ignore the case law espoused by the Supreme Court of Texas but also had to sanction a rather unusual departure from accepted and ordinary rules of evidence recognized not only in the State Courts but also in the Federal Courts. An examination of the record will disclose that B. F. Schoeneman was called as a witness by the respondent and his testimony which contained positive, clear and rebutting evidence to the administrative presumption was offered after B. F. Schoeneman had been presented to the Court as a witness for the respondent and his truth and veracity had been admitted by the respondent by his presentation to the Court. The testimony of B. F. Schoeneman and the testimony of H. L. Flynt, a witness for the petitioner, was nowhere in conflict on the question of true ownership and the testimony of these two

men was the only evidence offered by either side on the basic question of true ownership for consideration by the court. In order to arrive at a decision that a jury question was presented the court of appeals had to ignore the fact that the testimony of B. F. Schoeneman was offered as the testimony of the witness of the respondent, and allow the respondent to ignore the effect of his own witness when respondent was attempting to prevail upon a judgment obviously not predicated on the undisputed testimony of this, his own witness. The petitioner submits this is the rankest departure from the ordinary rules and in itself is sufficient to invoke a hearing before this court.

2.

Not only did the Court of Appeals go to great length to ignore the decisions of the Supreme Court of Texas on the basic question involved, that of true ownership of the vehicle in question, but also ignored additional decisions of the Texas Supreme Court governing the interpretation of insurance policies in effect at the sufferance of the state legislature and administrative bodies.

As recognized in the opinion of the Court of Appeals the policy in question contained an endorsement, which endorsement contained the statement:

> "Owned by H. L. Flynt and leased to the insured"

and contained a further endorsement which provided:

> "Title to the 1952 Ford truck * * * is vested in the name of B. F. Schoeneman, d b a Midwest Contracting Company, however, said automobile had been sold under a conditional agreement to H. L. Flynt. It is agreed that

> for interpretation and coverage under the policy H. L. Flynt shall be considered to be the owner of said automobile."

Transport Insurance Company v. Standard Oil Company of Texas, 337 S. W. 2d 284 (S. C. Tex. 1960), clearly stated the requirements of the Supreme Court of Texas that an insurance policy just as any other contract is to be interpreted to effectuate the intention of the parties to the contract as expressed by the words used. The policy before the Court in this case clearly set out the intention of the parties on the question of ownership and yet in spite of the requirement of the Supreme Court of Texas that this intention be carried out, the Court of Appeals ignored not only the express language of policy, but also the express law of the State as espoused by the Texas Supreme Court which would require an effectuation of the obvious intention of the parties on the question of ownership.

Again the Court of Appeals for the Fifth Circuit ignored its own previous decision in *American Fidelity and Casualty Company, Inc. v. St. Paul Mercury Indemnity Company, 248 Fed. 2d 409 (Fifth Circuit, 1957)*, in which opinion the Court had said:

> "Adhering to the traditional view that as between insurer and assured, terms of doubtful, double or inviguous meaning are to be liberally construed * * * *insurance policies, as any other contract, are to be interpreted to effectuate the intention of the parties as expressed by the words used.*" (Emphasis added.)

Thus, in judicial deafness the Court of Appeals was not able to hear the requirements of the Supreme Court of Texas not only on the basic question of ownership of the vehicle

involved, but also on the requirement that effect be given to the obvious express intention of the parties to the contract.

It, therefore, is submitted that the Court of Appeals has so ignored the substantive law of the State of Texas in this case on a question of considerable importance in the field of public liability insurance and in addition thereto has so failed to follow normal accepted rules of evidence that the Supreme Court of the United States should grant a writ of certiorari as prayed for herein.

Respectfully submitted,

JAMES A. WILLIAMS,

916 Corrigan Tower,
Dallas 1, Texas,
Attorney for Petitioner.

CERTIFICATE OF SERVICE UPON ADVERSE PARTY

This is to certify that simultaneous with the filing of this Petition for Writ of Certiorari a true copy was forwarded to each counsel of record for the respondent by ordinary United States Mail properly addressed, postage prepaid.

JAMES A. WILLIAMS,
Attorney for Petitioner.

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18550

AMERICAN EMPLOYERS INSURANCE COMPANY,
Appellant,

v.

JOHN ZABLOSKY,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

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June 30, 1961

Before JONES and BROWN, Circuit Judges, and CARSWELL, District Judge.

JONES, Circuit Judge: The appellee, John Zablosky, was struck by a truck which was driven by Roy Alvin Tucker, an employee of H. L. Flynt. Zablosky sued Flynt and Tucker in a Texas State court seeking damages for his injuries sustained and recovered judgment for $100,000, with interest and costs.

Execution was issued and returned nulla bona. Basing federal jurisdiction on diversity of citizenship, Zablosky sued American Employers Insurance Company, herein referred to as the Insurance Company, the motor vehicle liability insurance carrier of B. F. Schoeneman, a contractor, claiming the truck was owned by Schoeneman, and that it, at the time of the injury, was being driven by Tucker as the employee of Flynt with the permission and consent of Schoeneman, thus invoking the coverage of the so-called omnibus clause.[1] Zablosky asserted other theories for recovery. These we need not consider since the case was submitted to the jury and recovery was allowed under the omnibus clause.

The policy was issued to B. F. Schoeneman, doing business as Midwest Contracting Co., and other trade names. When the truck which was involved in Zablosky's injury was added to the coverage of the policy the endorsement contained the statement, "owned by H. L. Flynt and leased to insured." This endorsement recited an additional premium of $177.40. A further endorsement provided:

> "Title to the 1952 Ford Truck * * * is vested in the name of B. F. Schoeneman, d/b/a Midwest Contracting Company, however, said automobile has been sold under a conditional agreement to H. L. Flynt. It is agreed that for interpretation of coverage under the policy H. L. Flynt shall be considered to be the owner of said automobile."

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[1]The unqualified word "insured" includes the named insured and also includes * * * any person while using an owned automobile * * * provided the actual use of the automobile is by the named insured or with his permission.

The truck had been purchased from a dealer by Schoeneman who executed a conditional sale contract to evidence and secure an unpaid portion of the purchase price. The installment payments were made by Schoeneman. The title to the truck was registered in the name of Schoeneman. He procured fire and theft insurance on the truck. Flynt had no insurance on the truck.

Schoeneman, called as a witness by Zablosky, testified that Flynt, who was in the hauling business had done considerable hauling for him, and on prior occasions he had assisted Flynt in obtaining credit, that Flynt had telephoned him that he, Flynt, was negotiating with a dealer for the truck but he had neither a down payment nor a trade-in and so could not finance the purchase and requested Schoeneman's help. Schoeneman, so he testified, agreed that the truck should be put in his name and he would execute a 24 monthly installment conditional sale contract with Flynt undertaking to pay Schoeneman one and one half installments each month. Schoeneman understood that Flynt was to give him preferential treatment in his hauling requests. Schoeneman expected that the amounts he would owe Flynt for hauling would be credited on the purchase of the truck. The transaction was in the form it took in order to provide financing for Flynt and security for Schoeneman, and the title to the truck, according to Schoeneman, was to be transferred to Flynt when Flynt had paid Schoeneman for it. The agreement between Schoeneman and Flynt was oral. The registered title to the truck was transferred to Flynt some time after the injury to Zablosky but not until Flynt had paid the full amount of the purchase

price to Schoeneman. It was shown that Tucker was driving the truck for Flynt when the injury occurred.

Both Zablosky and the Insurance Company moved for a directed verdict. Zablosky's motion asserted that the evidence conclusively established the ownership of the truck by Schoeneman, that it was being driven by Tucker as the employee of Flynt at the time of the accident, and hence Zablosky should recover under the omnibus clause. The Insurance Company's motion said that it was established without question that the truck, while registered in the name of Schoeneman, was in fact owned by Flynt, and that, while there might be an administrative presumption arising from the title registration that Schoeneman was the owner, such presumption vanished upon the showing that Flynt was the owner. Both motions were denied. The issues of ownership and permission to use were submitted to the jury. The pertinent instructions on the ownership issue were:

> "Under the Certificate of Title Act of the State of Texas it is unlawful to buy or acquire any title, other than a lien, in a motor vehicle or licensed in this state without then and there demanding of the proposed seller the registration receipt and certificate of title, covering the particular motor vehicle which shall, upon consummation of the purchase be transferred upon such form as may be provided by the Highway Department; and the legal or record title to a motor vehicle will not pass without compliance with the requirements of this Act. However, the laws of Texas do not prohibit the registration of a motor vehicle in a name other than that of the true owner. And without compliance with the provisions of the Certificate of Title Act above stated one may become the true owner of a motor vehicle under a sale (including a conditional sale) and the delivery of such motor vehicle

by the seller to the purchaser, with intent to pass the beneficial, equitable interest and true ownership thereof to the purchaser, whether or not the true owner is named as owner in the Certificate of Title; and registration receipt is transferred upon consummation of the purchase of the motor vehicle.

"The registration of a motor vehicle in Texas under the name of the individual or firm whose name is shown on the certificate of title to the motor vehicle as being the owner thereof, raises a presumption that such individual or firm is the owner of such motor vehicle. However, such a presumption of ownership may be rebutted and vanishes when positive evidence is presented that the true owner of the vehicle is a person other than the one in whose name the vehicle is registered."

The Insurance Company objected to portions of the charge but these objections are not made the basis of specifications of error and are not here insisted upon. The instructions are fair and accurate statements of the law. Vernon's Tex. Penal Code Section 1436-1; 7 Tex. Jur. 366 et seq., Sections 52-56, 70. In response to special interrogatories submitted by the court, the jury found that Schoeneman was the true owner of the truck and that, at the time of the accident, Flynt and Tucker had the permission and consent of Schoeneman to operate the truck. Judgment was entered for Zablosky. On appeal the questions submitted for determination, and the only questions submitted although stated in different ways, are whether as a matter of law, there is evidence to sustain the findings that Schoeneman was the true owner of the truck, and that the vehicle was being driven with his consent and permission.

The registration of the vehicle in the name of Schoeneman and the issuance of the title certificate to him raises the presumption that he was the owner of the truck. Such presumption is not evidence under the Texas law but is an "administrative presumption" which merely requires the person against whom the presumption is asserted to produce evidence to the contrary. If clear, positive and undisputed evidence to the contrary is introduced then the presumption, as the Texas courts state, "vanishes" or is "put to flight". *Empire Gas & Fuel Co. v. Muegge*, 135 Tex. 520, 143 S. W. 763; *Pioneer Mutual Compensation Co. v. Diaz*, 142 Tex. 184, 177 S. W. 2d 202. The Empire Gas & Fuel Co. case was cited by this court in *United States Casualty Co. v. Ohio Casualty Insurance Co.*, 208 F. 2d 451.

The Insurance Company concedes that there was a presumption raised by the title certificate that Schoeneman was the owner of the truck. It asserts, however, that there was a clear and positive proof to rebut the presumption and that there was no proof of Schoeneman's ownership except the title certificate and this, the Insurance Company earnestly contends, had been overcome. From the testimony presented the district court was not of the opinion that the presumption of the title certificate had been put to flight and made to vanish by clear, positive and undisputed evidence. The district court concluded that there were fact issues presented, and that these issues should be resolved by the jury. We do not think there was error in its conclusion and we affirm its judgment.

AFFIRMED.

APPENDIX B

JUDGMENT.

Extract from the Minutes of June 30, 1961

No. 18550

AMERICAN EMPLOYERS INSURANCE COMPANY

v.

JOHN ZABLOSKY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered and adjudged that the appellant, American Employers Insurance Company, and the surety on the supersedeas bond herein, Employers Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18550

AMERICAN EMPLOYERS INSURANCE COMPANY,
Appellant,

v.

JOHN ZABLOSKY,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(September 14, 1961)

ON PETITION FOR REHEARING

Before JONES and BROWN, Circuit Judges, and CARSWELL, District Judge PER CURIAM

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

APPENDIX D

Texas Motor Vehicle Certificate of Title Act

ART. 1436—1 MOTOR VEHICLES: CEFTIFICATE OF TITLE ACT

SHORT TITLE; LEGISLATIVE INTENT; "MOTOR VEHICLE" INCLUDES "HOUSE TRAILER"

Section 1. This Act shall be referred to, cited and known as the "Certificate of Title Act," and in the enactment hereof it is hereby declared to be the legislative intent and public policy of this State to lessen and prevent the theft of motor vehicles and house trailers, and the importation into this State of, and traffic in, stolen motor vehicles and house trailers, and the sale of encumbered motor vehicles and house trailers without the enforced disclosure to the purchaser of any and all liens for which any such motor vehicle or house trailer stands as security, and the provisions hereof, singularly and collectively, are to be liberally construed to that end. The terms hereinafter set out, as herein defined, shall control in the enforcement and construction of this Act, and it is further provided that wherever the term "Motor Vehicle" appears in this Act, it shall be construed to include "House Trailer." As amended Acts 1941, 47th Leg., p. 343, ch. 187, sec. 1; Acts 1947, 50th Leg., p. 168, ch. 105, sec. 1.

ACCESSORIES, INAPPLICABLE TO

Sec. 1a. The provisions of House Bill No. 407, Chapter 4, Acts of the Forty-sixth Legislature, Regular Session, and as by this Act amended, shall not apply to the filing or recording of a lien or liens which are created only upon tires, radios,

heaters, or other automobile accessories. Added Acts 1941, 47th Leg., p. 343, ch. 187, sec. 8.

"MOTOR VEHICLE" DEFINED

Sec. 2. The term "Motor Vehicle" means every kind of motor driven or propelled vehicle now or hereafter required to be registered or licensed under the laws of this State.

"HOUSE TRAILER" DEFINED

Sec. 2a. The term "House Trailer" means a vehicle without automotive power designed for human habitation and for carrying persons and property upon its own structure and for being drawn by a motor vehicle. Added Acts 1947, 50th Leg., p. 168, ch. 105, sec. 2.

"LIEN" DEFINED

Sec. 3. The term "Lien" means every kind of lease, conditional sales contract, deed of trust, chattel mortgage, trust receipt, reservation of title, or other written instrument of whatsoever kind or character whereby an interest, other than absolute title, is sought to be held or given in a motor vehicle, also any lien created or given by Constitution or Statute.

"OWNER" DEFINED

Sec. 4. The term "Owner" includes any person, firm, association, or corporation other than a manufacturer, importer, distributor, or dealer claiming title to, or having a right to operate pursuant to a lien on a motor vehicle after the first sale as herein defined, except the Federal Government and any of its agencies, and the State of Texas and any

governmental subdivision or agency thereof not required by law to register or license motor vehicles owned or used thereby in this State.

"MORTGAGEE" DEFINED

Sec. 5. The term "Mortgagee" means any person, firm, association, or corporation holding a lien as herein defined on a motor vehicle.

"MORTGAGOR" DEFINED

Sec. 6. The term "Mortgagor" means any person, firm, association, or corporation giving a lien on a motor vehicle or agreeing that a lien may be retained thereon or any part thereof or as against whom a lien arises under the Constitution or Statute.

"FIRST SALE" DEFINED

Sec. 7. The term "First Sale" means the bargain, sale, transfer, or delivery with intent to pass an interest therein, other than a lien, of a motor vehicle which has not been previously registered or licensed in this state or elsewhere; and such a bargain, sale, transfer or delivery, accompanied by registration or licensing of said vehicle in this state or elsewhere, shall constitute the first sale of said vehicle, irrespective of where such bargain, sale, transfer, or delivery occurred. As amended Acts 1951, 52nd Leg., p. 482, ch. 301, sec. 1.

"SUBSEQUENT SALE" DEFINED

Sec. 8. The term "Subsequent Sale" means the bargain, sale, transfer, or delivery, with intent to pass an interest

therein, other than a lien, of a motor vehicle which has been registered or licensed within this State or elsewhere, save and except when such vehicle is not required under law to be registered or licensed in this State; and any such bargain, sale, transfer, or delivery of a motor vehicle after same has been registered or licensed shall constitute a subsequent sale, irrespective of where such bargain, sale, transfer, or delivery occurred. As amended Acts 1951, 52nd Leg., p. 482, ch. 301, sec. 1.

"NEW CAR" DEFINED

Sec. 9. The term "New Car" means a motor vehicle which has never been the subect of a first sale either within this State or elsewhere. As amended Acts 1951, 52nd Leg., p. 482, ch. 301, sec. 1.

"USED CAR" DEFINED

Sec. 10. The term "Used Car" means a motor vehicle that has been the subject of a first sale whether within this State or elsewhere.

"PERSON" DEFINED

Sec. 11. The term "Person" includes individuals, firms, associations, and corporations required by law to register motor vehicles owned or used thereby, including officers, employees, or agents acting for the State of Texas or any Governmental subdivision or agency thereof, but shall not include the Federal Government or any of its agencies not required by law to register motor vehicles owned or used thereby. As amended Acts 1947, 50th Leg., p. 284, ch. 174, sec. 1.

"HEREAFTER" DEFINED

Sec. 12. The term "Hereafter" means after the effective date of this Act.

"RECEIPT" DEFINED

Sec. 13. The term "Receipt" means the written acknowledgment by a designated agent of the Department of having received an application for a certificate of title and the required fee, on such form as may be prescribed by the Department from time to time.

"STOLEN" AND "CONVERTED" DEFINED

Sec. 14. The terms "Stolen" and "Converted" mean the same as defined in the Penal Code.

"CONCEALED MOTOR VEHICLE" DEFINED

Sec. 15. The term "Concealed Motor Vehicle" means a motor vehicle that is concealed, as defined in Article 1557 of the Penal Code as amended by Acts of 1929, Forty-first Legislature, Page 237, Chapter 102, Section 1.

"MANUFACTURER" DEFINED

Sec. 16. The term "Manufacturer" means any person regularly engaged in the business of manufacturing or assembling new motor vehicles, either within or without this State.

"IMPORTER" DEFINED

Sec. 17. The term "Importer" means any person, except a manufacturer, who brings any used motor vehicle into this State for the purpose of sale within this State.

"DISTRIBUTOR" DEFINED

Sec. 18. The term "Distributor" means any person engaged in the business of selling to a dealer motor vehicles theretofore bought from a manufacturer.

"DEALER" DEFINED

Sec. 19. The term "Dealer" means any person purchasing motor vehicles for resale at retail to owners.

"MOTOR NUMBER" DEFINED

Sec. 20. The term "Motor Number" means the manufacturer's original number affixed to or imprinted upon the engine or motor in a motor vehicle.

"SERIAL NUMBER" DEFINED

Sec. 21. The term "Serial Number" means the manufacturer's serial number affixed to or imprinted upon the chassis or other part of the motor vehicle.

"MANUFACTURER'S CERTIFICATE" DEFINED

Sec. 22. The term "Manufacturer's Certificate" means a certificate on form to be prescribed by the Department showing original transfer of a new motor vehicle from the manufacturer to the original purchaser, whether importer, dis-

tributor, dealer, or owner, and when presented with an application for certificate of title must show thereon, on appropriate forms to be prescribed by the Department, each subsequent transfer between distributor and dealer, dealer and dealer, and dealer to owner.

"IMPORTER'S CERTIFICATE" DEFINED

Sec. 23. The term "Importer's Certificate" means the certificate on form to be prescribed by the Department of each used motor vehicle brought into this State for the purpose of sale within this State, and such importer's certificate must be accompanied by such evidence of title to the motor vehicle as the Department may, from time to time, require in order to show a good title and the names and addresses of all mortgagees.

"CERTIFICATE OF TITLE" DEFINED

Sec. 24. The term "Certificate of Title" means a written instrument which may be issued solely by and under the authority of the Department, and which must give the following data together with such other data as the Department may require from time to time:

(a) The name and address of the purchaser and seller at first sale or transferee and transferer at any subsequent sale.

(b) The make.

(c) The body type.

(d) The motor number.

At such time as the stamping of permanent identification numbers on motor vehicles in a manner and place easily accessible for physical examination is universally adopted by Motor Vehicle Manufacturers as the permanent vehicle identification, the Department is authorized to use such permanent identification number as the major identification of motor vehicles subsequently manufactured. The motor number will continue to be the major identification of vehicles manufactured before such change is adopted.

(e) The serial number.

(f) The license number of the current Texas plates.

(g) The names and addresses and dates of any liens on the motor vehicle, in chronological order of recordation.

(h) If no liens are registered on the motor vehicle, a statement of such fact.

(i) A space for the signature of the owner and the owner shall write his name with pen and ink in such space upon receipt of the certificate. As amended Acts 1947, 50th Leg., p. 544, ch. 321, sec. 1.

CERTIFICATE OF TITLE SECTION TRANSFERRED TO HIGHWAY DEPARTMENT

Sec. 24a. The certificate of title section, and its personnel, property, equipment, and records, now a part of the Department of Public Safety of the State of Texas, are hereby transferred to and placed under the jurisdiction of the Highway Department of the State of Texas. Added Acts 1941, 47th Leg., p. 343, ch. 187, sec. 9.

"DEPARTMENT" DEFINED

Sec. 25. The term "department" means the State Highway Department of the State of Texas. As amended Acts 1941, 47th Leg., p. 343, ch. 187, sec. 2.

"DESIGNATED AGENT" DEFINED

Sec. 26. The term "Designated Agent" means each County Tax Collector in this State who may perform his duties under this Act through any regular deputy.

APPLICATION FOR CERTIFICATE OF TITLE BEFORE SALE

Sec. 27. Before selling or disposing of any motor vehicle required to be registered or licensed in this State on any highway or public place within the State, except with dealer's metal or cardboard license number thereto attached as now provided by law, the owner shall make application to the designated agent in the county of his domicile upon form to be prescribed by the Department for a certificate of title for such motor vehicle.

MANUFACTURER'S CERTIFICATE

Sec. 28. No designated agent shall issue a receipt for an application for certificate of title to any new motor vehicle the subject matter of the first sale unless the applicant shall deliver to such agent a manufacturer's certificate properly assigned by the manufacturers, distributor, or dealer shown thereon to be the last transferee to the applicant, upon form to be prescribed by the Department.

IMPORTER'S CERTIFICATE

Sec. 29. No such designated agent shall issue a receipt for a certificate of title to any used motor vehicle imported into this State for the purpose of sale within this State without delivery to him by the applicant of an importer's certificate properly assigned by the importer upon form to be prescribed by the Department.

VEHICLES BROUGHT INTO STATE

Sec. 30. Before any motor vehicle brought into this State by any person, other than a manufacturer or importer, and which is required to be registered or licensed within this State, can be bargained, sold, transferred, or delivered with intent to pass any interest therein or encumber by any lien, application on form to be prescribed by the Department must be made to the designated agent of the county wherein the transaction is to take place for a certificate of title, and no such designated agent shall issue a receipt until and unless the applicant shall deliver to him such evidence of title as shall satisfy the designated agent that the applicant is the owner of such motor vehicle, and that the same is free of liens except such as may be disclosed on an affidavit in form to be prescribed by the Department.

RECEIPTS ISSUED BY DESIGNATED AGENTS

Sec. 31. Every designated agent in this State receiving an application for certificate of title shall, when the provisions hereof have been complied with, issue a receipt marked "Original" to the applicant and shall note thereon the re-

quired information concerning the motor vehicle and the existence or nonexistence of liens as disclosed in the application and deliver such receipt upon payment of the required fees to the applicant; provided however, that in the event there is a lien disclosed in the application, the said receipt shall be issued in duplicate, one of which shall be marked "Original" and shall be mailed or delivered by every such designated agent to the first lien holder as disclosed in said application; the other said copy shall be marked "Duplicate Original" and shall be mailed or delivered to the address of the applicant as disclosed in the said application, and such receipt pending the issuance of the certificate of title shall authorize the operation of such motor vehicle on the highways and public places within this State for a period of not to exceed ten (10) days and upon the expiration of such period of time shall cease to be effective for any purpose, but may be renewed under such reasonable rules and regulations as may be promulgated by the Department. As amended Acts 1941, 47th Leg., p. 343, ch. 187, sec. 3.

ISSUANCE OF CERTIFICATE OF TITLE

Sec. 32. Every designated agent within this State shall, on the same day issued by him forward to the Department, by mail prepaid postage, copies of all receipts issued by him together with such evidences of title as may have been delivered to him by the several applicants, and the Department within five (5) days after receiving such application, if upon inspection thereof it is satisfactorily shown that the certificate of title should issue, shall issue certificate of title marked "Original" on the face thereof and send the same to

the address of the applicant as given in his application by first class mail; provided however, that in the event there is a lien disclosed in the application the said certificate of title shall be issued in duplicate, one of which shall be marked "Original" and shall be mailed to the address of the first lien holder as disclosed in said certificate of title by first class mail; the copy of said certificate of title shall be marked "Duplicate Original" and shall be sent by first class mail to the address of the applicant as given in his application. As amended Acts 1941, 47th Leg., p. 343, ch. 187, sec. 4.

DUPLICATE ORIGINAL

Sec. 32a. The receipt or certificate of title marked "Duplicate Original" shall be used only as evidence of title of said motor vehicle and shall not be used by any person in transferring any interest in said motor vehicle or to establish any lien thereon. Added Acts 1941, 47th Leg., p. 343, ch. 187, sec. 10.

SALE; TRANSFER OF CERTIFICATE; AFFIDAVIT

Sec. 33. No motor vehicle may be disposed of at subsequent sale unless the owner designated in the certificate of title shall transfer the certificate of title on form to be prescribed by the Department before a Notary Public, which form shall include, among such other matters as the Department may determine, an affidavit to the effect that the signer is the owner of the motor vehicle, and that there are no liens against such motor vehicle, except such as are shown on the certificate of title and no title to any motor vehicle shall pass or vest until such transfer be so executed.

NEW CERTIFICATE OF TITLE WHEN ALL FORMS HAVE BEEN USED

Sec. 34. When all of the forms of transfer on any certificate of title have been used by reason of subsequent sales, such certificate of title may be delivered to any designated agent within this State, and a receipt taken therefor as provided in the case of first sale, and such agent shall forward the same to the Department on the same day received by him, and a new certificate of title shall be issued by the Department.

TRANSFER BY OPERATION OF LAW: NEW CERTIFICATE

Sec. 35. Whenever the ownership of a motor vehicle registered or licensed within this State is transferred by operation of law, as upon inheritance, devise or bequest, bankruptcy, receivership, judicial sale, or any other involuntary divesture of ownership, the Department shall issue a new certificate of title upon being provided with certified copy of the probate proceedings, if any (if no administration is necessary, then upon affidavit showing such fact and all of the heirs at law and specification by the heirs as to in whose name the certificate shall issue), or order, or bill of sale from the officer making the judicial sale, except however, that where foreclosure is had under the terms of a lien, the affidavit of the person, firm, association, or corporation or authorized agent, of the fact of repossession and divestiture of title in accordance with the terms of the lien, shall be sufficient to authorize the issuance of a new

certificate of title in the name of the purchaser at such sale, and except further that in the case of the foreclosure of any Constitutional or Statutory lien, the affidavit of the holder of such lien, or if a corporation, its agent, of the fact of the creation of such lien and the divestiture of title by reason thereof in accordance with law, shall be sufficient to authorize the issuance of a new certificate of title in the name of the purchaser.

LOSS OR DESTRUCTION OF CERTIFICATE: CERTIFIED COPY

Sec. 36. Should a certificate of title, "Duplicate Original" or "Original", be lost or destroyed, the owner or lien holder thereof may procure a certified copy of same directly from the Department by making affidavit upon such form as may be prescribed by the Department from time to time, accompanied by a fee of Twenty-five (25) Cents, which shall be deposited in the State Highway Fund and be expended as provided by Section 57 of this Act, provided however, that the certified copy of the certificate of title marked "Original" shall issue only to the first lien holder where a lien is disclosed thereon. Said certified copy and all subsequent certificates of title issued until transfer of ownership of said motor vehicle, shall be plainly marked across their faces 'Certified Copy' shall be eliminated from the new certificate of title. Any purchasers or lien holders of such motor vehicle may at the time of such purchase or at the time lien is established require the seller or owner to indemnify him and all subsequent purchasers of said motor vehicle against any loss which he or they may suffer by

reason of any claim or claims presented upon the said original certificate of title. In the event of recovery of the said certificate of title, "Duplicate Original" or "Original" thereof, the said owner shall forthwith surrender the same to the Department for cancellation and the words "Certified Copy" shall be eliminated from said certificates thereafter issued by the Department. As amended Acts 1941, 47th Leg., p. 343, ch. 187, sec. 5.

JUNKING MOTOR VEHICLE; REBUILDING OR ASSEMBLING MOTOR VEHICLE

Sec. 37. (a) When any motor vehicle registered or licensed in Texas to which a certificate of title has been issued is junked, dismantled, destroyed, or its motor number changed or the motor vehicle changed in such manner that it loses its character as a motor vehicle, or in such manner that it is not the motor vehicle described in such certificate of title, the owner named last in the certificate of title shall surrender the certificate of title to the Department together with the written consent of the holders of all unreleased liens noted thereon, and the certificate shall be cancelled on the records of the Department. Provided that nothing herein shall affect the sale of used parts for automobiles when sold as such.

(b) Any person rebuilding or assembling a motor vehicle, shall, before using same or operating same, or permitting the operation of same, or disposing of same, procure a certificate of title for same from the Department. For the purpose of obtaining any such certificate of title said per-

son shall furnish an affidavit setting forth where, when, and how, and from whom he procured the various respective parts used in the rebuilding or assembling of such motor vehicle for which certificate of title is sought; provided, however, that the Department shall not issue such certificate of title unless and until it has satisfied itself that the facts set forth are true and correct, and that the person making the affidavit is in fact the person purported in such affidavit to be the maker thereof.

GROUNDS FOR REFUSING OR REVOKING CERTIFICATE

Sec. 38. The Department shall refuse issuance of a certificate of title, or having issued a certificate of title, suspend or revoke the same, upon any of the following grounds:

(a) That the application contains any false or fraudulent statement, or that the applicant has failed to furnish required information requested by the Department, or that the applicant is not entitled to the issuance of a certificate of title under this Act.

(b) That the Department has reasonable ground to believe that the vehicle is a stolen or converted vehicle as herein defined, or that the issuance of a certificate of title would constitute a fraud against the rightful owner or a mortgagee.

(c) That the registration of the vehicle stands suspended or revoked.

(d) That the required fee has not been paid.

HEARING AFTER REFUSAL OR REVOCATION; APPEAL

Sec. 39. Any person interested in a motor vehicle to which the Department has refused to issue a certificate of title or has suspended or revoked the certificate of title, feeling aggrieved, may apply to the designated agent of the county of such interested person's domicile for a hearing, whereupon such designated agent shall, on the same day such application for hearing is received by him, notify the Department of the date of hearing, which shall not be less than ten (10) days nor more than fifteen (15) days and at such hearing such applicant and the Department may submit evidence, and a ruling of the designated agent shall bind both parties as to whether or not the Department has acted justly in the premises.

(a) Such applicant feeling aggrieved with the ruling of the designated agent, may, within five (5) days and not thereafter, appeal to the County Court of the county of the applicant's residence, who shall proceed to try the issues as in other civil cases, and all rights and immunities granted in the trial of civil cases shall be available to the interested parties.

(b) If the action of the Department complained of is sustained, a certificate of title for the particular motor vehicle involved shall only be issued upon such reasonable rules and regulations as the Department may prescribe.

(c) Should the final decision be against the ruling of the Department, the certificate of title shall issue forthwith.

AUTHORITY TO EXECUTE APPLICATION OR TRANSFER

Sec. 40. No person shall, without lawful authority, execute any application or transfer any certificate of title or receipt for any person other than himself, except that firms, associations, and corporations may act through authorized agents.

LIEN; NOTATION ON CERTIFICATE

Sec. 41. No lien shall be valid on any motor vehicle which is hereafter the subject of a first sale, or be enforceable against any such motor vehicle unless there is noted on the importer's or manufacturer's certificate the date, name, and address of the mortgagees whose rights arise out of or are incident to such first sale by reason of the execution of any written instrument by the transferee.

LIEN; APPLICATION FOR NEW TITLE; PERSONS WITHOUT NOTICE

Sec. 42. No lien on any motor vehicle shall be valid as against third parties without actual knowledge thereof or enforceable against the motor vehicle of any such third parties as the issuance of a certificate of title thereof, unless an application for a new title is made as prescribed in this Act and all first and subsequent liens noted by the Department thereon.

PRIORITY OF LIENS

Sec. 43. All liens on motor vehicles shall take priority according to the order of time the same are recorded on the

receipt or certificate of title of all such recordings to be made by the Department.

NOTATION OF LIEN

Sec. 44. No lien on any motor vehicle to which a receipt or certificate of title has been issued shall be valid as against third parties without actual knowledge thereof, or enforceable against the motor vehicle of any such third parties, unless the notation of said lien shall have been caused to be made on receipts and certificates of title on said motor vehicle, as provided in this Act.

MORTGAGEE'S RIGHTS NOT AFFECTED BY EXPOSURE FOR SALE

Sec. 45. Exposure for sale of any motor vehicle by the owner thereof with the knowledge or consent of any mortgagee shall not affect the rights of any mortgagee as against all third parties.

CREDITORS, LIENS VALID AGAINST

Sec. 46. Only liens noted on a receipt or certificate of title shall be valid as against creditors of the mortgagor insofar as concerns the motor vehicle.

DISCHARGE OF LIEN

Sec. 47. When a lien is discharged, the holder thereof shall, on demand of the owner, execute and acknowledge before a Notary Public the discharge of the lien upon such form as may be prescribed by the Department, and upon presenta-

tion of such evidence, the owner may present the certificate of title to the designated agent in the county together with application for title as prescribed in this Act and shall receive from the Department a new title.

CANCELLATION OF DISCHARGED LIEN

Sec. 47a. The Department is hereby authorized to cancel any discharged lien which has been properly recorded on a Certificate of Title provided the record mortgages,[1] whether such mortgages[1] be an individual, firm, corporation, bank, estate, or any Governmental loaning agency, is nonexistent, or cannot be located to enable the registered owner to obtain a release of such discharged lien, provided such properly recorded lien may not be cancelled unless and until such recorded lien has been of record for six (6) years or more. Added Acts 1947, 50th Leg., p. 1008, ch. 426, sec. 1.

DUPLICATE RECEIPT OR CERTIFICATE

Sec. 48. No duplicate receipt or certificate of title shall be issued without the surrender of the original, except upon such reasonable rules and regulations as may be promulgated by the Department.

ALTERATION, FORGING OR COUNTERFEITING CERTIFICATES; MOTOR AND VEHICLE NUMBERS

Sec. 49. (a) Any person who shall alter any certificate of title issued by the Department, or forge or counterfeit any certificate of title purporting to have been issued by the

[1]Probably should read "mortgagee".

Department under the provisions of this Act, or who shall alter or falsify or forge any assignment thereof, shall be guilty of forgery and upon conviction thereof shall be punished as provided by law.

(b) It shall hereafter be unlawful for any person to alter, change, erase, or mutilate, for the purpose of changing the identity, any motor number, serial number, or manufacturer's number placed on a vehicle, or any part thereof by the manufacturer, or any motor number or serial number assigned by the State Highway Department and placed or caused to be placed on a vehicle by the owner as provided by law for the purpose of identification. It shall also be unlawful for any person other than a vehicle manufacturer to stamp or place any motor number or manufacturer's serial number other than a number assigned by the State Highway Department as provided by law, on any vehicle or any part thereof. Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than Twenty-Five ($25) nor more than Two Hundred Dollars ($200.00). As amended Acts 1947, 50th Leg., p. 251, ch. 147, sec. 1.

(c) Any person who shall have in his possession a motor vehicle, a motor, a motor block, or any part thereof, knowing that the motor number, serial number, or manufacturer's number, placed on same by the manufacturer for the purpose of identification has been changed, altered, erased, or mutilated, for the purpose of changing the identity of said motor vehicle, motor, motor block, or any part thereof, shall be

guilty of a misdemeanor, and shall be punished as provided by this Act.

(d) Any regularly constituted peace officer finding anyone in possession of a motor vehicle, motor, motor block, or any part thereof, on which the motor number, serial number, or manufacturer's number has been altered, changed, erased, or mutilated, shall immediately take into his possession such motor vehicle and shall hold same for a sufficient length of time to establish identity and make the necessary investigation to determine ownership.

(e) If no serial number is die stamped upon a house trailer by the manufacturer of such house trailer, or if the serial number so assigned and die stamped by the manufacturer has been removed or obliterated, the Department shall, upon proper application, assign a serial number for such house trailer, and this assigned serial number shall be die stamped by the applicant, at the place designated by the Department upon such house trailer for which such serial number is assigned. The manufacturer's serial number or the serial number assigned by the Department shall be used as the major identification of the house trailer in the issuance of a Certificate of Title thereon. Added Acts 1947, 50th Leg., p. 168, ch. 105, sec. 3.

Another par. (e) was added by Acts 1947, 50th Leg., p. 452, ch. 255, sec. 1. See post.

(e) Any owner of a motor vehicle, trailer or semitrailer making application for an assigned motor number for a

motor vehicle or serial number for a trailer or semitrailer, shall present with the application for an assigned motor number or serial number the outstanding Certificate of Title; in the event no Certificate of Title is outstanding on the motor vehicle, trailer or semitrailer the application shall be accompained by bill of sale or such other sufficient evidence of ownership as may be required by the Department. A fee of One Dollar ($1) shall accompany each such application and shall be deposited in the State Highway Fund. Added Acts 1947, 50th Leg., p. 452, ch. 255, sec. 1.

Another par. (e) was added by Acts 1947, 50th Leg., p. 168, ch. 105, sec. 3. See ante.

STOLEN, CONVERTED OR CONCEALED MOTOR VEHICLE

Sec. 50. Whenever any motor vehicle registered or licensed in this State is reported to the Department as having been stolen, converted, or concealed, it shall be the duty of the Department, to make a distinctive record thereof and to note the fact on its records of the certificate of title and when any such motor vehicle so reported as stolen, converted or concealed has been recovered or found, it shall be the duty of the party making the report to the Department to likewise forthwith notify the Department of the fact so that the Department's records may be changed accordingly.

OFFERING FOR SALE OR AS SECURITY WITHOUT RECEIPT OR CERTIFICATE FORBIDDEN

Sec. 51. It shall hereafter be unlawful for any person, either by himself or through any agent, to offer for sale or to sell or to offer as security for any obligation any motor vehicle registered or licensed in this State without then and there having in his possession the proper receipt or certificate of title covering the motor vehicle so offered.

BUYING WITHOUT DEMANDING RECEIPT AND CERTIFICATE FORBIDDEN

Sec. 52. It shall hereafter be unlawful to buy or acquire any title other than a lien in a motor vehicle registered or licensed in this State without then and there demanding of the proposed seller the registration receipt and certificate of title covering the particular motor vehicle which shall, upon consummation of the purchase, be transferred upon such form as may be provided by the Department.

SALES IN VIOLATION OF ACT VOID

Sec. 53. All sales made in violation of this Act shall be void and no title shall pass until the provisions of this Act have been complied with.

STOLEN, CONVERTED OR CONCEALED VEHICLE; APPLICATION UNLAWFUL

Sec. 54. It shall be unlawful for any person to make application for a certificate of title on any motor vehicle within this State known by such person to have been stolen, converted or concealed.

RULES AND REGULATIONS; FORMS

Sec. 55. The Department may, from time to time, promulgate such reasonable rules and regulations as it may deem necessary to carry out the orderly operation of this Act and to prescribe such forms as are herein provided for, as well as such others as it may deem proper, and shall provide the several designated agents within this State with sufficient supply thereof.

DESIGNATED AGENTS; LIABILITY ON BOND

Sec. 56. It is hereby expressly made the duty of the several designated agents in this State to comply with the provisions hereof, and any such designated agent failing or refusing so to do shall be liable on his official bonds for any damages suffered by any person.

FEES; EXPENSES OF ADMINISTRATION

Sec. 57. Each applicant for a certificate of title or reissuance thereof shall pay to the designated agent the sum of fifty (50¢) cents, of which twenty-five (25¢) cents shall be retained by the designated agent. Twenty (20%) per cent of such twenty-five (25¢) cents shall be set aside as a special salary fund for extra compensation and personal expenses of the designated agent for additional duties required of him by this Act; and from the remainder he shall be entitled to sufficient money to pay expenses necessary to efficiently perform the duties set forth herein; and the remaining twenty-five (25¢) cents shall be forwarded to the Department for deposit to the State Highway Fund, together with the applica-

tion for certificate of title, within twenty-four (24) hours after same has been received by said designated agent, from which fees the Department shall be entitled to and shall use sufficient money to pay all expenses necessary to efficiently administer and perform the duties set forth herein; and there is hereby appropriated to the Department all of such fees for salaries, traveling expense, stationery, postage, contingent expense, and all other expenses, necessary to administer this Act through the biennium ending August 31, 1951. Provided any such designated agent may employ any and all necessary assistants and incur any and all necessary expense in administering this Act in his county. Such designated agent shall pay such employed assistants and such necessary expenses incurred by him from the Funds retained by him hereunder, and any amount of such funds remaining in his hands in any event shall be by him remitted to the Road and Bridge Fund of his county; provided further, that in counties in which the designated agent is compensated on a fee basis, he shall be entitled to retain, as added compensation, the fund created by the twenty (20%) per cent of the twenty-five (25¢) cents above set aside; and in counties where he is compensated on a salary basis, the Commissioners Court shall fix and allow, as additional salary for the duties required under this Act, a sum annually not less than fifty (50%) per cent and not more than the total of the special salary fund created by setting aside one-fifth of such twenty-five (25¢) cents fee retained, any excess to be paid into the Road and Bridge Fund of the county. As amended Acts 1941, 47th Leg., p.

343, ch. 187, sec. 6; Acts 1943, 48th Leg., p. 404, ch. 272, sec. 1; Acts 1951, 52nd Leg., p. 620, ch. 368, sec. 1.

ALTERATION OF CERTIFICATE OR RECEIPT

Sec. 58. It shall be unlawful for any person to, in any manner, alter any manufacturer's or importer's certificate or any receipt or certificate of title after the same has been issued.

FALSE OR FICTITIOUS NAME OR ADDRESS:

Sec. 59. It shall be unlawful to use a false or fictitious name or give a false or fictitious address or make any false statements in any application for certificate of title.

APPLICATION OF ACT

Sec. 60. The provisions of this Act shall not apply to vehicles owned or operated by the Federal Government or any of its agencies unless such vehicle is sold to a person required under this Act to procure a Certificate of Title, in which event the provisions hereof shall be fully operative as to such vehicle; but shall apply to vehicles owned or acquired by the State of Texas, any County, City, School District, or any other subdivision of State Government; provided however, that the provisions of Section 57 of this Act requiring the payment of fees, shall not apply to vehicles owned or acquired by the State of Texas, any County, City, School District, or

any other sub-division of State Government. As amended Acts 1947, 50th Leg., p. 285, ch. 174, sec. 2.

FALSE OF FICTITIOUS NAME OR ADDRESS: MISREPRESENTATIONS

Sec. 61. It shall be unlawful to give any false or fictitious name or address or other information required to be given on the forms provided by the Department to be executed by any applicant for a certificate of title or to falsely misrepresent any fact concerning the release or discharge of any liens on motor vehicles covered by a receipt or a certificate of title.

VIOLATIONS

Sec. 62. Any person who shall violate any provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than One Dollar ($1) nor more than One Hundred Dollars ($100) for the first offense, and may, upon any subsequent conviction for a violation of the same provision, within the discretion of the jury, be given double the amount of punishment provided for a first violation.

EFFECTIVE DATE; RECEIPT FORMS

Sec. 63. (a) This Act shall become effective October 1, 1939, and the Department shall provide each designated agent within this State with a supply of receipt forms for issuing on or before the effective date hereof and shall promulgate

such reasonable rules and regulations as are herein provided for on or before August 1, 1939, and provide each designated agent within the State with at least five (5) copies thereof.

(b) The Department or any agent thereof shall not after the 1st of January, 1942, register or renew the registration of any motor vehicle, unless and until the owner thereof shall make application for and be granted an official certificate of title for such vehicle or present satisfactory evidence that a certificate of title for such vehicle has been previously issued to such owner by the Department. Provided, however, this shall not apply to automobiles which were purchased new prior to January 1, 1936.

(c) The owner of a motor vehicle registered in this State shall not after January 1, 1942, operate or permit the operation of any such motor vehicle upon any highways without first obtaining a certificate of title therefor from the Department, nor shall any person operate any such motor vehicle upon the public highways knowing or having reason to believe that the owner has failed to obtain a certificate of title therefor.

PARTIAL INVALIDITY

Sec. 64. If any section, subsection, or clause of this Act is, for any reason, held to be unconstitutional such decision shall not effect the validity of any of the remaining portions of this Act, and it is hereby declared that this Act would nevertheless have been passed without such section, subsection, or clause so declared unconstiutional. Acts 1939, 46th Leg., p. 602.

APPENDIX E

EMPIRE GAS & FUEL CO.

v.

MUEGGE et al.

No. 1831-7529

Commission of Appeals of Texas, Section B.

Oct. 23, 1940.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by Ed Muegge and another against the Empire Gas & Fuel Company for damages caused by overturning of truck in attempt to avoid collision with another truck. Judgment for plaintiffs was affirmed by the Court of Civil Appeals, 116 S. W. 2d 758 and defendant brings error.

Judgment of the district court and the Court of Civil Appeals reversed, and cause remanded to the district court.

Albert Stone, of Brenham, and Baker, Botts, Andrews & Wharton and W. M. Ryan, all of Houston, for plaintiff in error. W. J. Embrey and Richard Spinn, both of Brenham, for defendants in error.

SMEDLEY, Commissioner.

The Court of Civil Appeals affirmed a judgment of the trial court in favor of defendants in error Muegge and Pardowski against plaintiff in error Empire Gas & Fuel Company for $1,358.20, on account of personal injuries and damage to their automobile truck and other property, sustained when the truck in which they were traveling turned over

and was wrecked in avoiding collision with an automobile truck, loaded with a ditch-digging machine, which had become wedged in an underpass on a public highway. 116 S. W. 2d 758.

Application for writ of error was granted on the assignment that the trial court erred in overruling the defendant's (Plaintiff in error's) motion for an instructed verdict. All of the special issues submitted were answered favorably to defendants in error. By the jury's affirmative answer to Special Issues 1 and 2 liability was imposed upon plaintiff in error for the operation of the truck which was wedged in the underpass. The first special issue was: "Do you find from a preponderance of the evidence that the loaded Chevrolet Truck in question was owned or operated by the defendant, Empire Gas & Fuel Company, at the time, place and occasion complained of by the plaintiffs?"

The second special issue was: "Do you find from a preponderance of the evidence that the defendant, its employees, servants or agents, blocked the underpass on Highway No. 20, east of Brenham, at the time, place and occasion complained of, with the Chevrolet Truck loaded with ditching machinery?"

Plaintiff in error contends that the evidence did not raise these special issues, and that on the contrary it conclusively appears from the evidence that the truck was not owned by it, that the driver of the truck was not its employee, and that the truck was not being operated either by or for it. It becomes necessary to set out the evidence relied upon by defendants in error to charge plaintiff in error with liability for the neg-

ligent operation of the Chevrolet truck, and by reason of the nature of that evidence it will be necessary to set out also the evidence relied upon by plaintiff in error.

The accident occurred August 14, 1935. The truck which became wedged in the underpass was driven by one Warren Angel, a resident of Oklahoma. Ed Muegge, one of defendants in error, testified that a short time after the accident he asked the man driving the truck to furnish him his name and address and the number of the truck and that the man wrote on a piece of paper and gave it to him. The memorandum so written was admitted in evidence over the objection of plaintiff in error. It is: "Empire Gas & Fuel Company. Texas 162-347. Bartlesville, Okla., Warren Angel."

Defendants in error offered in evidence certified copies of two duplicate registration certificates. One of these certificates shows the registration of the Chevrolet truck in Gray County, Texas, on March 29, 1935, in the name of Empire Gas & Fuel Company as owner, and the other shows the registration of the same truck in Gray County on July 17, 1935, also in the name of Empire Gas & Fuel Company as owner.

A member of the Texas State Highway Patrol testified that after the accident, when the truck had been driven to the town of Brenham, he asked Warren Angel, whom he found in charge of the truck, to give him such registration certificates and permits as he had and that Angel gave him the two registration certificates and also a permit to transport the load over the highways. These Angel took from the truck. According to the testimony of the witness, the law requires truck drivers to carry such certificates and permits

in their trucks at all times. The permit, a photostatic copy of which is in evidence, was issued at Paris, Texas, on August 12, 1935, by a division bookkeeper and a division engineer of the Texas Highway Department. By its terms it gives authority to Empire Gas & Fuel Company to transport the truck and its load, the ditch-digging machine, with an aggregate gross weight of 23,470 pounds, from Denison, Texas, to Yoakum, Texas, over a designated route.

The foregoing is a statement of the substance of all of the evidence offered by defendants in error, before they rested, bearing upon ownership or operation of the truck by plaintiff in error.

G. L. Wheatley testified by deposition as follows: He is and has been for nine years superintendent of the motor transport division of Empire Gas & Fuel Company, having supervision of the purchase, maintenance and operation of motor vehicles, and being in charge of registration of motor vehicles owned by the company. His office keeps a record of the registration of all the company's trucks. Empire Gas & Fuel Company has never owned the truck which was wedged in the underpass and the records of the company do not reflect that it ever owned it. In the questions the truck was identified by make, model and engine number. He never caused that truck to be registered in the State of Texas in the name of Empire Gas & Fuel Company and never authorized anyone so to register it. Empire Gas & Fuel Company did not have any operations at or near Yoakum, Texas, during the month of August, 1935, which would have necessitated the use of a ditching machine. He did not authorize

anyone to obtain a permit in the name of Empire Gas & Fuel Company for the transportation of a ditching machine over the highways of the State of Texas during the month of August, 1935. He did not know until about September 1, 1935, that the truck was registered in the name of the Empire Gas & Fuel Company or that a permit had been issued in the name of said company to transport a ditching machine.

J. E. Howell, general superintendent of oil production of Empire Gas & Fuel Company, testified by deposition as follows: He has held such position for the past six years, his duty being to supervise the operations of all development and construction of the oil production division of the company. He has control of the operation of the company in the State of Texas. Warren Angel has never been employed by Empire Gas & Fuel Company in any capacity. During the month of August, 1935, Empire Gas & Fuel Company was conducting operations in various counties in Texas, but none at or near Yoakum. The company had no interest in the transportation of a ditch-digging machine from Denison, Texas, to Yoakum on or about August 14, 1935, and did not authorize J. R. Stewart or any other person to make application for a permit to transport it. J. R. Stewart was not employed by Empire Gas & Fuel Company in any capacity during the month of August, 1935. He first learned that the truck was registered in the name of Empire Gas & Fuel Company in the latter part of August or early part of September, 1935.

The testimony of Owen Hartness by deposition was offered by plaintiff in error and is in substance as follows: In August, 1935, he was engaged, as now, in the transfer and stor-

age business in Pawhuska, Oklahoma, owning and operating nine trucks, among them being the Chevrolet truck identified by model and engine number as the truck which transported the ditch-digging machine from Denison, Texas, to Yoakum, Texas. He bought the truck about March 1, 1935, and has owned it since he bought it. The truck was used to transport a ditching machine from Denison, Texas, to Yoakum, Texas, in the month of August, 1935. As far as he knew the Empire Gas & Fuel Company had no connection with the transportation of the machine. In August, 1935, he leased the truck to J. R. Stewart, of J. R. Stewart Construction Company, to be used to transport the ditching machine and employed Warren Angel to drive the truck. Angel was paid by him but was to take his instructions from Stewart. He procured licenses for the truck in the states of Oklahoma, Texas, Missouri and New Mexico and paid the fees. Hartness testified that he registered the truck in Gray County, Texas, on March 29, 1935, in the name of the Empire Gas & Fuel Company. In explanation of such action, he testified that he had at about that time a contract with the Empire Gas & Fuel Company to move some material for it from Texas to Kansas and found that it was both overload and over-length and that he would have to procure a special permit, which required a bond in Texas, and that, on his own account and for his own convenience, he registered the truck in the name of the Empire Gas & Fuel Company, to save himself the time, trouble and expense of registering it in his name and giving a bond. Later the registration certificate was lost and at his instruction his employee, Frank Archambo, on July 17, 1935, in order to procure another license, registered the

truck again in Gray County. This registration was made in the name of the Empire Gas & Fuel Company because the first registration was so made and for the same reason.

The testimony of J. R. Stewart by deposition was offered by plaintiff in error and is in substance as follows: He is and was in August, 1935, owner of J. R. Stewart Construction Company, engaged in the business of laying pipe lines. He was not employed in any capacity by Empire Gas & Fuel Company during August, 1935. That month he was engaged in laying a pipe line near Yoakum, Texas, for Southwest Gas Company. Empire Gas & Fuel Company was in no way interested in that work and had no connection with it. He owned the ditching machine which was being transported from Denison, Texas, to Yoakum, Texas, in August, 1935, in a truck owned by Owen Hartness and driven by Warren Angel. He made a contract with Hartness for the transportation of the machine. It was to be picked up at Seminole, Oklahoma, and delivered to Yoakum, Texas. He had no contract with Empire Gas & Fuel Company in connection with the transportation of the machine and made no arrangements about it with anyone except Hartness. He knew that the truck was registered in the name of Empire Gas & Fuel Company and that the certificates were carried in the truck. At the request of Hartness he procured from the Texas Highway Department, in the name of Empire Gas & Fuel Company, the permit for carrying the overload on the truck, signing his name to the application for the permit, which was issued at Paris, Texas. The officer who issued the permit required no evidence of authority or ownership except

the registration certificates, which he submitted to him. He delivered the permit to the driver.

Plaintiff in error propounded interrogatories to Warren Angel and endeavored to procure his deposition but it was not procured in time for the trial. One of the assignments in the application for writ of error complains of the action of the trial court in overruling plaintiff in error's motion for continuance based on the absence of Warren Angel and its inability to procure his attendance or his deposition.

In rebuttal and from the cross-examination of witnesses who testified by deposition, defendants in error introduced the following evidence: A bond executed by Empire Gas & Fuel Company, with a surety, on March 24, 1934, in the sum of $5,000, payable to the State Highway Department of Texas, conditioned that the company would make payment for any damages which any road or bridge traversed or crossed might sustain in consequence of the transportation permitted under any permit issued by the State Highway Department, the bond to apply to any permits issued during the twelve months' term from the date thereof; and another bond of like form and tenor, executed March 20, 1935, given to continue the first bond in effect for a term of twelve months, beginning March 24, 1935. It was shown that the last of these bonds was mailed to the State Highway Department on March 29, 1935, by an assistant general superintendent of Empire Gas & Fuel Company, with the reguest that it notify various officers of the state of the filing of the bond so that applications for permits for overloads might be made in the different districts.

It is shown by the testimony of Owen Hartness that during March, 1935, as at other times, he was engaged in transporting machinery, equipment and pipe in Oklahoma and occasionally went into Texas and other states for loads or to take loads, under contract, and that about March 29, 1935, he was employed by H. G. Briggs, who works for Empire Gas & Fuel Company, to transport some oil field equipment from Pampa to Kansas. Defendants in error offered in evidence copies of two overload permits, which appear to be duplicates, issued by the Texas State Highway Department, dated March 29, 1935, giving authority to Empire Gas & Fuel Company to transport a storage tank in the Chevrolet truck from Pampa to the Oklahoma line.

Over objection by plaintiff in error that the documents bore no seal and no certificate of the authority of the person purporting to certify to them, the court admitted in evidence, offered by defendant in error, photostatic copies of an application for certificate of title for the Chevrolet truck made by Owen Hartness to the Motor Vehicle Department of the State of Oklahoma on March 13, 1935, a transfer or assignment of title to the said truck from Hartness to Empire Gas & Fuel Company dated March 28, 1935, and a certificate from the State Highway Commission of Oklahoma dated March 28, 1935, showing that the truck had been registered as belonging to Empire Gas & Fuel Company.

The evidence offered by defendants in error to prove that the Chevrolet truck was being operated at the time of the accident by or for Empire Gas & Fuel Company consisted of proof that the truck was registered in the name of that com-

pany and that a permit was issued to that company authorizing it to transport the ditching machine in the truck and the memorandum given by the driver of the truck to one of defendants in error. For the reasons hereinafter set out, the memorandum should not have been admitted and no effect can be given to it as evidence.

(1, 2) Proof that the truck was registered in the name of Empire Gas & Fuel Company raised the presumption that it was owned by that company, and if evidence had shown that Warren Angel, the driver of the truck, was in the employ of the Empire Company the further presumption would have been raised that such driver was acting within the scope of his employment. Broaddus v. Long, Tex. Sup., 138 S. W. 2d 1057, 1058. There is no evidence in the record that Warren Angel was ever employed by the Empire Company. We need not determine in this case whether, from the operation of the truck on the highway under registration in the name of Empire Gas & Fuel Company, the presumption arises that the driver was an employee of that company, for, on the same principle that makes registration evidence, prima facie, of ownership, it seems that the issuance of the permit in the name of Empire Gas & Fuel Company to tarnsport the ditching machine in the truck raised the presumption that it was being transported for that company.

(3) It is settled in this state, and by the weight of authority elsewhere, that such presumption is not evidence but rather a rule of procedure or an "adminstrative assumption" which "vanishes" or is "put to flight" when positive evidence to the contrary is introduced. Lewis v. J. P. Word Transfer

Co., Tex. Civ. App., 119 S. W. 2d 106; J. P. Word Transfer Co. v. Lewis, Tex. Civ. App., 118 S. W. 2d 641; Houston News Company v. Shavers, Tex. Civ. App., 64 S. W. 2d 384, application for writ of error refused; Texas News Company v. Lake, Tex. Civ. App., 58 S. W. 2d 1044; Alfano v. International Harvester Co., Tex. Civ. App., 121 S. W. 2d 466; Hudson v. Ernest Allen Motor Co., Tex. Civ. App., 115 S. W. 2d 1167; Haden v. Riggs, Tex. Civ. App., 84 S. W. 2d 789, 794, affirmed 127 Tex. 314, 94 S. W. 2d 152; Caswell v. Maplewood Garage, 84 N. H. 241, 149 A. 746, 73 A. L. R. 433; Tullis v. Blue, 216 Ala. 577, 114 So. 185; 20 Amer. Jur., pp. 170, 171, Sec. 166.

(4) The presumption is a true presumption, which has been defined as "a rule of law laid down by the courts' which attaches to facts certain procedural consequences." McCormick & Ray's Texas Law of Evidence, Sec. 32, p. 48. It places on the party against whom it operates the burden of producing evidence. It is not evidence and when met by rebutting proof is not to be weighed by the jury or treated by the jury as evidence in arriving at a verdict. McCormick & Ray's Texas Law of Evidence, pp. 51, 58, Sections 34, 37; 20 Amer. Jur. pp. 170, 171, Sec. 166.

That such is the established rule in this state is settled by the authorities above cited, particularly Lewis v. J. P. Word Transfer Co. and Houston News Co. v. Shavers. In the Lewis case Associate Justice Looney quoted with approval a full and clear statement of the rule and its effect from the opinion of Associate Justice Alexander in the Shavers case. The approval by this court of the rule there

stated, the substance of which has been given above, is evidenced by its refusal of applications for writs of error in both cases.

(5) It follows that the presumption as to the ownership of the truck arising from the registration and the presumption as to its use in transporting the ditching machine arising from the permit are not to be regarded as having raised an issue or issues of fact for the jury's determination if such presumptions were met by positive rebutting proof.

(6, 7) There is conflict in the decisions as to the degree and character of proof necessary to rebut or overcome such presumption. By some it is held that the presumption disappears when met by positive proof or substantial proof or by evidence which the jury has the right to believe or by the uncontradicted testimony of the defendant. Others hold that the presumption is not overcome by the testimony of the defendants alone or by the testimony of interested witnesses or by evidence which the jury has the right to disbelieve. See the authorities discussed in notes, 42 A.L.R. 907-908; 74 A.L.R. 954-958; 96 A.L.R. 637-640; McCormick & Ray's Texas Law of Evidence, pp. 51, 52, Sec. 34. The authorities are, however, in almost complete agreement that the presumption is conclusively overcome by clear positive and undisputed evidence. See the Texas cases, supra, and the decisions in the A.L.R. notes above cited.

In the instant case plaintiff in error made full disclosure of the facts within its knowledge bearing upon the controverted question. The substance of the testimony of two of its officials, whose duties and records in their custody were

such that they should know the facts as to ownership of the truck and its operation, is that the company did not own the truck, did not authorize it to be registered in its name, and did not authorize the permit to be issued in its name, that Warren Angel had never been employed by the company and that it was in no way interested in the operation of the truck or in the transportation of the ditching machine.

The testimony of these witnesses is clear, positive and uncontradicted, but if it should be discredited because they are employees of plaintiff in error, it is fully corroborated by the testimony of Hartness and Stewart. The substance of their testimony is that Hartness owned the truck, that the driver Warren Angel was employed by Hartness, and that by contract between Hartness and Stewart, to which Empire Gas & Fuel Company was in no way a party, the ditching machine owned by Stewart was being transported in the truck owned by Hartness and driven by Hartness' driver, to be used by Stewart near Yoakum, Texas, in the performance of Stewart's contract to lay a pipe line for the Southwest Gas Company.

Even if the several acts of Hartness in registering the truck in the name of Empire Gas & Fuel Company and procuring permits for overloads in its name, together with evidence that Hartness, at about the time the truck was first registered, did certain hauling from Pampa to Oklahoma and Kansas under contract with plaintiff in error, should be considered evidence sufficient to raise an issue of fact as to the ownership of the truck, still there is no evi-

dence whatever in the record that the truck at the time of the accident was operated by an employee of Empire Gas & Fuel Company or in furtherance of the business of that company. As to that essential element of defendants in error's case, the clear, positive and undisputed evidence is that the truck at that time was not operated by, for, or in the interest of said company.

The memorandum written by the driver and delivered to defendant in error Muegge a short time after the occurrence of the accident was: "Empire Gas & Fuel Co. Texas 162-347. Bartlesville, Okla. Warren Angel." It was written and delivered in response to the request of Muegge that the driver furnish him his name and address and the number of the truck. This memorandum seems to be a statement that the truck is registered in the name of Empire Gas & Fuel Company, that the registration number is Texas 162-347 and that the driver's name is Warren Angel. So construed, it adds nothing, even if admissible, to the proof made by the registration certificates. If the memorandum is read as meaning that Angel at the time was acting as an employee of Empire Gas & Fuel Company, it clearly is inadmissible under the settled rule, equally applicable to the relation of master and servant, that the fact of agency cannot be proven by declarations of the alleged agent. Lewis v. J. P. Word Transfer Co., Tex. Civ. App. 119 S. W. 2d 106, 108, application for writ of error refused; Gibson v. Gillette Motor Transport, Inc., Tex.Civ.App., 138 S.W.2d 293, application for writ of error refused.

The Lewis case is directly in point. In that case, the trial court admitted a statement, made by the driver of the truck at the scene of the accident and soon after its occurrence, to the effect that he was working for the defendant transfer company and that the truck belonged to it. It was held that this evidence was no part of the res gestae but was mere hearsay and should have been excluded. In support of the conclusion that the statement as to the driver's employment was not part of the res gestae, the court quoted from the opinion written by Associate Justice Martin in Stokes Bros. v. Thornton, Tex. Civ. App., 91 S. W. 2d 756, 757, as follows: "His employment was not a part of the collision. That transaction, speaking of itself spontaneously through him at the time, could not include any such unrelated statement". See, also, Webb- North Motor Co. v. Ross, Tex. Civ. App., 42 S. W. 2d 1086; Alfano v. International Harvester Co., Tex. Civ. App., 121 S. W. 2d 466; Linden Lumber Co. v. Johnston, Tex. Civ. App., 128 S. W. 2d 121; McCormick and Ray's Texas Law of Evidence, pp. 661, 662, Sec. 508.

The trial court should have instructed a verdict for plaintiff in error. However, the cause will be remanded rather than rendered, the court not being thoroughly satisfied that the facts have been fully developed.

(8) In view of another trial, other assignments of error will be discussed briefly. Photographs of the scene of the accident offered in evidence should have been admitted. The objections made went to the weight of the photographs as

evidence rather than to their admissibility. There was testimony that the photographs, although taken after the occurrence of the accident, fairly and accurately represented the underpass and the approach to it as they existed on the day of the accident.

(9) Objection made to the introduction of photostatic copies of certain instruments on file in the office of the title division of the State Highway Commission of the State of Oklahoma, for want of sufficient authentication, should have been sustained. The copies were authenticated only by certificate, without seal, signed by the chief enforcement officer of the State Highway Commission. Newsom v. Langford, Tex. Civ. App., 174 S. W. 1036; Id., Tex. Com. App., 220 S. W. 544; 22 C. J. pp. 852-854, Secs. 1015-1020; McCormick and Ray's Texas Law of Evidence, Sec 583, pp. 740-742.

(10) The portion of the court's charge which instructed the jury that the "burden of proof is upon the plaintiffs to establish their allegations and damages by a preponderance of the evidence" should have been omitted. Gattegno v. The Parisian, Tex. Com. App., 53 S.W.2d 1005. The preferred method of dealing with the question of burden of proof in submitting cases on special issues is that suggested and explained in Federal Surety Co. v. Smith, Tex. Com. App., 41 S.W.2d 210, 214, and Traders & General Insurance Co. v. Jenkins, Tex. Com. App., 141 S.W.2d 312.

(11, 12) Objection should have been sustained to special issues Nos. 1 and 2, which have been set out at the beginning of this opinion. Each of said issues submits more than one distinct and separate question of fact.

Questions presented by other assignments probably will not arise on another trial.

The judgments of the district court and the Court of Civil Appeals are reversed, and the cause is remanded to the district court.

Opinion adopted by the Supreme Court.

APPENDIX F

PIONEER MUT. COMPENSATION CO.

v.

DIAZ

No. 8175

SUPREME COURT OF TEXAS

Jan. 26, 1944.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by J. A. Diaz against the Pioneer Mutual Compensation Company to recover on a public liability policy covering plaintiff's truck. To review a judgment of the Court of Civil Appeals, 178 S. W. 2d 121, affirming a judgment for plaintiff, defendant brings error.

Judgments of the trial court and the Court of Civil Appeals affirmed.

Joseph G. Bennis, of El Paso, for plaintiff in error.

R. P .Langford and J. H. McBroom both of El Paso, for defendant in error.

HICKMAN, Commissioner.

In the trial court the respondent, J. A. Diaz, was awarded judgment against the petitioner, Pioneer Mutual Compensation Company, on a policy of public liability insurance issued by the Company to Diaz as the sole owner of a delivery truck and the judgment was affirmed by the Court of Civil Appeals.

An employee of respondent, while driving the truck covered by the policy, struck and killed a child. The parents of the child instituted suit against respondent and his driver for damages on account of the child's death. Petitioner undertook the defense of the suit under an agreement whereby it was stipulated that it did not waive any of its defenses against liability on the policy. That suit was compromised by the payment to the parents by respondent of $1,812.40. Both parties hereto consented to the compromise, and it is agreed that, if petitioner is liable on the policy, the amount paid by respondent is the measure of that liability. This suit was instituted by respondent for the recovery of that amount and resulted, as above indicated, in a judgment in his favor.

Petitioner's home office is in Albuquerque, New Mexico. It did business in El Paso through its agent, Fletcher Belk, Jr., who countersigned the policy in suit. While the nature of the contract between Belk and the Company was not established upon the trial and is not of controlling importance, it is inferable that Belk was a local recording agent under the provision of Article 5058 Vernon's Annotated Civil Statutes, since the company is a foreign corporation and Belk countersigned the policy. On all relevant dates Diaz operated the Barrell House Liquor Store under a power of attorney from his brother, the owner thereof. He had no permit to operate a delivery truck and conceived the law to be that he could not lawfully deliver products from the liquor store to its customers. Adrian Garcia operated taxicabs in El Paso and had a permit under which he could lawfully deliver liquor from the liquor store to its customers. With the increase in the business of his taxicabs

it became more and more difficult to have deliveries made in that manner and, for the purpose of having such deliveries promptly made, Diaz purchased for cash the truck here involved and, through arrangement with Garcia had the title thereto placed in Garcia's name and obligated himself to pay a percentage of the total business done by the truck for the use of his permit. Garcia owned no interest in the truck and had nothing whatever to do with its operation. It was operated by Diaz through his paid employees. On the advice of his attorney, Diaz had Garcia execute a demand note to him in the sum of $800, the amount which Diaz paid for the truck, and secured the note by a chattel mortgage on the truck. This was done to protect Diaz against any possible transfer by Garcia. Shortly before the issuance of the policy here involved Diaz notified Belk that he wanted a public liability policy written under his and Garcia's name. Diaz explained to Belk that Garcia had a carrier's permit; that according to the law he, Diaz, could not deliver his own goods if the truck was registered in his name. Two different companies represented by Belk declined the risk because it was written in the two names and thereafter Diaz instructed Belk to have it written in his name alone. Thereupon Belk wrote to the petitioner requesting that it issue a policy to Diaz covering certain specified risks and in reply to the request the policy in suit was issued.

(1) We have concluded that the Court of Civil Appeals correctly decided each question presented, but in view of arguments advanced here by petitioner it is deemed advisable to write further on a few of the question. The argument is pressed that petitioner should be relieved of liability on

the ground of public policy. The test of whether a demand connected with an illegal transaction may be enforced at law is whether or not a case may be established without reliance on the illegal transaction. Stone v. Robinson, Tex. Com. App., 234 S. W. 1094; 17 C. J. S., Contracts, sec. 276. In Labbe v. Corbett, 69 Tex. 503, 506, 6 S. W. 808, 810, Justice Stayton observed: "* * * The tendency of the decisions in this state has been towards denial of the invalidity of a contract, on the mere ground that one party to it may have known of an intention on the part of the other to use the subject-matter of the contract for an unlawful purpose. McKinney v. Andrews, 41 Tex. (363), 366; Bishop vs. Honey, 34 Tex. (245,) 252. Be the rule as it may, the mere knowledge of the appellee that the appellant may have intended to drive the sheep on or over public roads would not invalidate the contract when the purpose was to give and limit the uses to which the sheep might be applied, and not to regulate the incidental powers the appellant might use in controlling and caring for them, with a view to make the lawful uses most profitable to himself."

(2) Had the petitioner obligated itself to indemnify respondent against the consequences of the violation of law, the contract would clearly have been illegal and void as against public policy. But the obligation of this policy does not rest upon that basis. The accident resulting in the death of the child was the foundation of the civil liability of Diaz to the parents of such child and likewise the foundation of the liability of petitioner on the policy of indemnity. The obligation of petitioner was not to indemnify respondent for damages resulting because of the violation by him of any law, but was

to indemnify him from civil liability on account of the operation of the truck. We have concluded that the Court of Civil Appeals correctly held that petitioner should not be relieved of liability on the ground of public policy.

(3) Errors are assigned to the rulings of the courts below on questions of alleged improper argument of counsel to the jury. The first special issue in the Court's charge called upon the jury to answer whether or not respondent Diaz was the owner of the truck covered by the policy at the time of its issuance and acceptance. That issue was answered in the affirmative. In his address to the jury one of respondent's attorneys used this language: "An answer to Question 1 is an answer to the whole law suit." The contention is made that by this language the attorney informed the jury of the effect of its answer to the issue. It will be noted that the language does not inform the jury as to how the issue should be answered, but merely states that the answer, whatever it may be, will be controlling. It may be, as insisted by respondent, that upon that ground the assignment should be overruled. But however that may be, we base our holding on this question upon another ground. After the jury had retired to consider the case it addressed to the Court the following communication: "Can a man be the owner of property although the title is in the name of another?" In answer to the inquiry the court, in writing, instructed the jury as follows: "In connection therewith you are instructed that the term 'owner' as used in the Court's Main Charge includes any person claiming title to, or having a right to operate pursuant to a lien on, a motor vehicle after the first sale as herein defined."

Under that definition there was no issue of fact raised by the evidence as to the ownership by Diaz of the truck, for he certainly claimed it. The question, therefore, of whether the attorney improperly informed the jury of the effect of its answer becomes immaterial for no other answer than the one returned could have been made.

(4, 5) But it is claimed that the Court erred in overruling the exceptions timely filed by petitioner to that definition. The exceptions are long and will not be set out in full here, but the effect thereof was to complain of the definition because, under the Certificate of Title Act (Art. 1436-1, Vernon's Texas Annotated Penal Code) from which the definition was copied, a certificate of title is the primary and controlling evidence of title and ownership. In effect the objection was not that the definition was too broad when applied to a case like this, because it included persons merely claiming the title to the vehicle and persons having a right to operate same pursuant to a lien, but that under the above statute Diaz could not be the owner, because the truck was registered in the name of Garcia. We approve the holding of the Court of Civil Appeals that the statute should not be given that construction. The registration in Garcia's name raised the presumption of ownership. Such presumption, however, is not evidence, but is "an administrative presumption" which vanishes when positive evidence to the contrary is introduced. Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 143 S.W.2d 763.

(6) Another of respondent's attorneys stated in his address to the jury that "The contract will stand unless you find

fraud." The contention that this constituted error is answered by the fact that the jury was not called upon to "find fraud." The word "Fraud" was not used in the charge and it cannot be concluded that, by this argument, the jury was probably influenced in answering any other issue submitted. Further, the language does not disclose to what contract the statement was referable. There is no showing as to whether it was the contract of insurance in suit or the contract between Diaz and Garcia.

We do not sustain any assignment of error in the application, and it is accordingly ordered that the judgments of the trial court and the Court of Civil Appeals both be affirmed.

Opinion adopted by the Supreme Court.

APPENDIX G

UNITED STATES CAS. CO.

v.

OHIO CAS. INS. CO.

No. 14572

United States Court of Appeals

FIFTH CIRCUIT

Dec. 9, 1953.

REHEARING DENIED JAN. 5, 1954.

Before HUTCHESON, Chief Judge, and BORAH and RIVES, Circuit Judges.

United States Casualty Company sued The Ohio Casualty Insurance Company seeking reimbursement of one-half of the sum of Ten Thousand Dollars paid in settlement of a lawsuit growing out of an accident caused by the driver of a truck on which both companies carried liability insurance.

There was no substantial dispute about the material facts. Admittedly, the settlement was in a reasonable amount and due diligence was exercised in making it. On September 6, 1950, W. D. Temple was the owner of the truck and as such secured liability insurance policy from United States Casualty Company under which that Company made the Ten Thousand Dollar settlement. On October 11, 1950, the certificate of title to the truck was transferred by Temple to Kaufman County Farmers Co-operative Association, and the automobile liability insurance policy of The Ohio Casualty Company was issued to that Association as the named in-

sured with the usual "omnibus" provision covering persons using the vehicle with the permission of the named insured. The Association paid Temple no consideration for the transfer of the certificate of title to the truck, the purpose being simply to enable Temple to transport some fertilizer for the Association. Temple did not have proper permits from the Railroad Commission to haul for hire, and the plan was to transfer the certificate of title of the truck to the Association so that it would appear to be hauling its own fertilizer. Temple was paid the same rate per ton for hauling as was usually paid, and he made all repairs, furnished all gasoline and oil for the operation of the truck, and exercised complete control over the truck. As the manager of the Association frankly admitted, "The deal was to circumvent the Railroad Commission ruling."

(1) The hauling for the Association was completed by December 15, 1950; and a request was then made on the mortgagee of the truck to bring in the certificate of title so that it could be transferred back to Temple. One December 19, 1950, Temple had a new motor installed in the truck for which he paid $296.00. For some reason the mortgagee failed for more than two weeks to produce the certificate of title, and it was not actually transferred back to Temple until after the accident in question had occurred on December 31, 1950. In Texas the presumption created by the certificate of title may be overcome by evidence of actual ownership. Empire Gas and Fuel Co. v. Muegge, 135 Tex. 520, 143 S. W. 763.

(2) At the time of the accident, Temple was in the truck and it was being driven by his son but on no business for the Association. The Association had no control over the operation of the truck, and no capacity to grant permission for its use. See 5 Am. Jur., Automobiles, Sec. 535. The operation of the truck was not by virtue of any permission express or implied from the Association. Indeed, if it had been so minded, the Association could not have prevented Temple from operating the truck. Even if we assume that the policy issued by The Ohio Casualty Insurance Company to the Association was originally valid,[1] the interest of its named insured in the truck had ceased more than two weeks before the accident, and it did not cover the liability of the operator or of the then owner of the truck. The judgment was right and it is Affirmed.

[1]See Employers Liability Assurance Corporation v. Sweatt, 95 N. H. 31, 57 A. 2d 157; 7 Appleman on Insurance Law and Practice, p. 6, Sec. 4253; 6 Blashfield Cyclopedia of Automobile Law and Practice, Sec. 3873, pp. 537, 538.

FILED
NOV 25 1961
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 522

AMERICAN EMPLOYERS INSURANCE COMPANY,
Petitioner,

v.

JOHN ZABLOSKY,
Respondent.

BRIEF FOR RESPONDENT JOHN ZABLOSKY IN OPPOSITION

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2-4
Argument	4-11
Question One	4-8
Question Two	8-11
Conclusion	11-12
Certificate of Service	13

Page

Empire Gas & Fuel Co. v. Muegge, 143 S. W. 2d 763 (Com. App. 1940, adopted S. Ct. Tex.) 4

Harper v. Highway Motor Freight Lines (Civ. App. Dallas, 1935), 89 S. W. 2d 448 7

Pioneer Mutual Compensation Company v. Diaz, 177 S. W. 2d 202 (S. Ct. Tex. 1944) 4-5

United States Casualty Co. v. Ohio Casualty Co., C.C.A. 5, 208 F. 2d 451 5

United States Ins. Co. of Waco v. Boyer, 269 S. W. 2d 340 10

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BRIEF FOR RESPONDENT JOHN ZABLOSKY IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Petition 29-34) is reported at *292 F. 2d 412.*

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1961 (Petition 35). A Petition for Rehearing was denied on September 16, 1961 (Petition 37). The Petition for Writ of Certiorari was filed on October 27, 1961. Jurisdiction of this court is invoked under *28 U. S. C., Section 1254.*

QUESTIONS PRESENTED

Whether the courts below erred in holding that substantial evidence of ownership of the insured vehicle, in addition to the administrative presumption of ownership arising from the registration of the vehicle in the insured's name, raised an issue for the jury on the question of ownership notwithstanding the Texas rule that the administrative presumption vanishes when met by clear, positive, and undisputed evidence of ownership in another.

Whether the court below erred in affirming judgment for respondent, entered on jury finding that the insured was the owner of the vehicle registered in his name, and specifically listed in the insurance policy, and for which a full owner's premium, which would not have been chargeable for a hired or leased vehicle registered in the name of the insured, was charged, notwithstanding the fact that the policy contained statements that the vehicle was owned by another and leased to insured, that title to the vehicle was registered in the name of the insured, but the vehicle had been sold to another and that for interpretation of coverage under the policy that such other should be considered to be the owner of the vehicle.

STATEMENT

Respondent sued petitioner to recover, upon a policy of comprehensive automobile liability insurance issued by petitioner, the amount of a judgment for damages for personal injuries obtained by respondent in the District Court

of Van Zandt County, Texas, against Roy Alvin Tucker and H. L. Flynt (R. pp. 1-7).

The policy of comprehensive automobile liability insurance was issued to B. F. Schoeneman dba Midwest Contracting Company, named insured, and (with certain exceptions not applicable here) under the omnibus clause insured any person using an automobile owned by the named insured, or any person legally responsible for the use thereof, provided the actual use of the automobile was with the permission of the named insured, against damages which such persons should become legally obligated to pay because of bodily injury caused by accident and arising out of the use of the automobile (R. pp. 188, 189, Insuring Agreements I and III).

The damages for which respondent recovered judgment in the state court resulted from personal injuries received by respondent in an accident wherein, while crossing U. S. Highway 80 in the City of Grand Saline, Texas, on foot, on December 14, 1953, respondent was struck by a Ford motor truck being driven by Roy Alvin Tucker, as agent and employee of H. L. Flynt, on a mission for H. L. Flynt (R. pp. 14, 231).

At the time of the accident the Ford motor truck was registered in the name of Midwest Contracting Company, the trade name under which B. F. Schoeneman operated a sole proprietorship (R. pp. 58, 243-244). The certificate of title to the motor vehicle was in the name of Midwest Contracting Company (R. pp. 60, 241). The truck was being purchased by B. F. Schoeneman dba Midwest Contracting

Company under a written conditional sales contract between Bankston-Hall Motors, Inc., dealer, and Midwest Contracting Company, by B. F. Schoeneman, owner, buyer (R. pp. 284-285). The purchase was upon an installment obligation signed by Midwest Contracting Company by B. F. Schoeneman, owner, buyer (R. p. 284). The installments on such purchase obligation before, at, and after the accident were paid by B. F. Schoeneman with his own funds (R. pp. 61, 287-288). The Ford motor truck was listed in the policy of comprehensive automobile liability insurance issued by petitioner to B. F. Schoeneman, dba Midwest Contracting Company, as a vehicle covered by the policy (R. p. 207) and B. F. Schoeneman was charged by and paid to petitioner a premium for coverage of the motor vehicle on a specified car basis which was equivalent to the premium chargeable for insurance of an owned automobile under the policy (R. pp. 83, 137-138).

B. F. Schoeneman testified that immediately upon purchase the truck was delivered to H. L. Flynt, with Schoeneman's knowledge, for use by Flynt in the hauling business in which he, Schoeneman, knew Flynt used drivers of his trucks (R. pp. 66-67).

ARGUMENT

Question One

Petitioner's claim to error of the Court of Appeals proceeds on the theory that *Empire Gas & Fuel Co. v. Muegge, 143 S. W. 2d 763 (Com. App. 1940, adopted S. Ct. Tex.); Pioneer Mutual Compensation Company v. Diaz, 177 S. W. 2d*

202 (S. Ct. Tex. 1944) and *United States Casualty Co. v. Ohio Casualty Co., C. C. A. 5, 208 F. 2d 451*, holding that the administrative presumption of ownership of a vehicle arising from the registration thereof is overcome by clear, positive, and undisputed evidence, and does not raise an issue of fact for the jury's determination when met by such positive proof, foreclosed any issue of fact in the case for consideration by the jury, and that the trial court erred in submitting the issue of ownership to the jury and the Court of Appeals erred in sustaining such submission.

Each of the three cases is authority for the abstract proposition that presumption of ownership of a vehicle arising from registration thereof is overcome by clear, positive, and undisputed evidence, and does not raise an issue for the jury's determination when met by such positive proof. In each of the cited cases a vehicle had been registered in the name of another who had no ownership in the vehicle of any kind or character whatsoever. In the first of the cases the vehicle was registered by the owner in the name of a corporation, without its knowledge or permission. In the second of the cases, the vehicle was registered in another's name because the owner believed it would have been unlawful to use the vehicle in his liquor operations if owned by him. In the third of the cases, the vehicle was registered in the name of another in order to enable that other to do hauling for the owner for which the other did not have a permit from the Railroad Commission of Texas.

Petitioners' proposition is based on the false premise that there was no evidence of ownership in the record here other

than the administrative presumption arising from the registration of the vehicle in the name of the named insured. In this premise petitioner is mistaken, for the reason that in this case there was substantial evidence of ownership independent of the presumption of ownership predicated upon the registration of the vehicle in the insured's name. In the record here there is in evidence a written conditional sales agreement signed by B. F. Schoeneman covering the purchase of the vehicle by B. F. Schoeneman, as purchaser (R. pp. 284-285). The agreement contains as a part thereof a note signed by B. F. Schoeneman as sole obligor for the purchase price (R. p. 284). The purchase obligation called for monthly payments on the purchase price by B. F. Schoeneman (R. p. 284). The evidence without dispute disclosed that the monthly payments were made by B. F. Schoeneman by checks disbursing his money and that such monthly payments were made in each of the twelve months leading up to the accident and in each of the twelve months following the accident by B. F. Schoeneman (R. pp. 61-63, 160-161). The evidence established the fact that B. F. Schoeneman as purchaser was carrying and paying for insurance on the truck at the time of the accident insuring B. F. Schoeneman against loss to the truck through the hazards of fire, theft and collision (R. pp. 63, 289). The evidence established that B. F. Schoeneman caused the truck to be carried in his comprehensive public liability policy (R. p. 64) and paid the equivalent of a full owner's premium for the insurance afforded by the policy in respect of the truck (R. pp. 83, 137-138) and that if the truck had not been owned by him he would have been covered

under the policy in respect of this truck without the charge of that premium (R. pp. 87, 189).

B. F. Schoeneman testified that the truck had been sold by Schoeneman to Flynt upon an oral conditional sales contract (R. pp. 71, 77). H. L. Flynt testified that he signed a statement on December 24, 1953, ten days after the accident, that he was buying the Ford truck from B. F. Schoeneman (R. pp. 101-102). He denied at the trial eight years later that this was true (R. p. 102). Each admitted that no transfer of the title certificate was made; in fact, each testified that the transfer was not to be made for a period of two years (R. pp. 74, 102-103), which would have constituted a violation of the laws of Texas (Article 1436-1, Penal Code of Texas) (Petition Sec. 33, p. 50, Secs. 52 and 53, p. 62). Each testified that no written agreement evidenced the alleged sale (R. pp. 71, 108). Each testified that no note and no mortgage was given by Flynt to Schoeneman to cover the alleged sale (R. pp. 77, 108). The evidence established the fact that Schoeneman, as owner, insured the vehicle against loss to the truck from the hazards of fire, theft, and collision (R. pp. 63, 289-292) and public liability and property damage (R. pp. 64-65, 188, 207). The evidence established the fact that Flynt, if the car was his, did not protect himself against the hazards of liability for bodily injury and property damage on account of the use of the truck (R. pp. 103-104). Schoeneman had priority on the use of the truck (R. pp. 76, 102).

Harper v. Highway Motor Freight Lines (Civ. App. Dallas, 1935), 89 S. W. 2d 448, is authority for the proposition that evidence of ownership consisting of an admission of own-

ership by the president of the company, in addition to the administrative presumption arising from proof that the name of the company appeared upon the side of the vehicle, was sufficient to raise a jury issue, notwithstanding the fact that under Texas rule presumption of ownership arising from the fact of the name of the company being upon the vehicle, vanished upon the testimony of the defendant's president at the trial that it did not own the vehicle. The evidence of ownership here was more substantial.

It is clear that there was substantial evidence of ownership, independent of the presumption arising from the registration of the vehicle in the name of the insured, to raise an issue for the jury on the question of the identity of the true owner, and that the Court of Appeals, in sustaining the correctness of the trial judge in so ruling and submitting the issue to the jury, did not incorrectly apply the law of Texas as declared by its Supreme Court.

Question Two

In respect to Question Two, petitioner argues that it intended to insure B. F. Schoeneman only and no other person in respect to liability growing out of the use of the Ford motor truck. Respondent was not able to produce the original insurance policy at the trial. B. F. Schoeneman could not find his policy (R. pp. 65-66). The petitioner supplied a copy reconstructed from its files certified to be a true copy. The Ford motor truck in question was added to the policy of liability insurance by endorsement 1C (R. p. 207), which contains the notation "owned by H. L. Flynt and leased to

insured". There also appears on the policy an endorsement (R. p. 222) which reads:

> "Title to the 1952 Ford Truck M#F7J2MP10547 and Standard Float Semi Trailer is vested in the name of B. F. Schoeneman DBA Midwest Contracting Company, however said automobile has been sold under a conditional sale agreement to H. L. Flint (sic). It is agreed that for interpretation of coverage under the policy H. L. Flint shall be considered to be the owner of said automobile."

It is undisputed that petitioner charged and collected a premium for the coverage of this automobile equivalent to the premium which would have been chargeable if the vehicle were owned by the named insured B. F. Schoeneman (R. pp. 83, 137-138). Such a premium under the insurance regulations of Texas in force at the time could have been charged for the coverage of a motor vehicle in two situations (1) where the vehicle was owned by the named insured, or (2) where the vehicle was owned by another and hired by the named insured (R. pp. 83, 132-133, 293). However, such rate could not have been charged for a hired automobile which was registered in the name of the named insured (R. pp. 83, 293). And B. F. Schoeneman was otherwise covered under the policy in respect of liability on non-owned automobiles without the charge of that premium (R. p. 87). The agent of petitioner who handled the coverage of the liability insurance in respect of the Ford motor truck testified that he understood that there was a contract of sale for the vehicle from Schoeneman, the named insured, to Flynt (R. pp. 136, 142, 143). The petitioner knew the title remained in Schoeneman. The policy so recited. These

facts put the petitioner upon notice under the laws of Texas that the sale was void and B. F. Schoeneman remained the owner of the Ford motor truck (Petition Sec. 33, p. 50, Secs. 52 and 53, p. 62). The petitioner charged B. F. Schoeneman an owner's rate for insuring the Ford motor truck under the policy. Clearly such a rate would not have been chargeable for insurance of the vehicle under the policy if it had been owned by H. L. Flynt. When the petitioner insured the vehicle under the policy and charged the named insured an owner's premium for such insurance, which would not have been chargeable for the vehicle if it had not been owned by the named insured, it by force of law intended to insure B. F. Schoeneman in respect to the vehicle and any person using the vehicle or any person legally responsible for the use thereof while used with the permission and consent of B. F. Schoeneman. This would hold regardless of an endorsement purporting to limit coverage. This is clear for the reason that the conditions of insurance policies in Texas are prescribed by the law of Texas. The comprehensive automobile liability policy written in this instance by the petitioner was one prescribed by Texas law which required that such a policy contain the omnibus clause which extends such insurance to the additional insured described above. Any endorsement attempting or purporting to eliminate such coverage would be in violation of law and of no legal effect whatsoever. The Supreme Court of Texas said in *United States Ins. Co. of Waco v. Boyer, 269 S. W. 2d 340:*

> "As a practical matter, the actual intent involved in the precise words is as much or more the intent of the

> Insurance Commission which prescribes the wording of the policy as it is the intent of the parties. It is unlawful to issue a policy in words other than those expressly approved by the Insurance Commission, and every insurance company selling this type of insurance is required to word its policies precisely alike. Art. 5.06 Insurance Code, V. A. C. S. Uniform policies are necessary to a uniform rate structure, which in turn resulted from the public injury caused by highly competitive wildcat insurance schemes. Therefore, a true search for what the courts usually speak of as the intent of parties will not be an inquiry as to what the words of the contract meant to this particular insurer or insured."

In this case the jury on disputed facts found that B. F. Schoeneman and not H. L. Flynt was the true owner of the Ford motor truck. The petitioner charged B. F. Schoeneman and collected from him a full owner's premium for the insurance provided by the policy. The petitioner had notice of the facts. The endorsement which would purport or attempt, if it does, to eliminate the omnibus clause is violative of Texas law and of no force or effect.

CONCLUSION

It is clear that the Court of Appeals did not ignore or incorrectly apply the Texas law involved in this cause as declared by the Texas Supreme Court. There was substantial evidence before the jury to raise the issue of the true ownership of the vehicle. This evidence was in addition to and independent of the administrative presumption of ownership which arose upon the proof of registration of the vehicle in the name of the named insured. The jury on disputed facts found that the named insured was the true

owner of the vehicle. The petitioner insured the named insured against the hazard of public liability in respect to the vehicle involved which was specifically listed in the policy and charged a full owner's premium for such insurance which would not have been chargeable for a vehicle registered in the name of the named insured and leased or hired from another. Under the Texas law the insurer by virtue of law intended to insure the named insured and any person driving an owned automobile with his permission. On the jury determination that the named insured was the owner of the vehicle, by operation of the Texas law the petitioner intended to insure the driver of the vehicle, who was driving with permission of the named insured, at the time of the accident. In short, petitioner was paid the full premium to provide the insurance coverage on which by the judgment below it has been called upon to respond. It is clear that the Court of Appeals has not decided an important state question in conflict with applicable state law. For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Irving L. Goldberg, do hereby certify that I served a copy of the foregoing Brief of Respondent in Opposition upon James A. Williams, Esquire, 916 Corrigan Tower, Dallas 1, Texas, by depositing the same in a United States mail box, with first class postage prepaid, addressed to said counsel of record at that post office address on November , 1961.

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IRVING L. GOLDBERG